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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

SEPTEMBER TERM, 1912, AND
JANUARY TERM, 1913.

BY
W. W. CORNWALL
REPORTER

VOLUME XLI.

BEING VOLUME CLVIII OF THE SERIES.

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* Justice McClain was Chief Justice until January 1, 1913. Succeeded by Justice Weaver, who became Chief Justice in rotation

† The terms of Justices McClain and Sherwin expired January 1, 1913, and they were succeeded by Justices Preston and Gaynor.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, SEPTEMBER 1912, AND
JANUARY 1913, TERMS,
AND IN THE SIXTY-SIXTH AND SIXTY-SEVENTH YEARS
OF THE STATE.

R. F. DOWNING, Appellee, v. FARMERS MUTUAL and FIRE
INSURANCE COMPANY, Appellant.

Insurance: ADJUSTMENT OF LOSS: BY-LAW PROVISION. The provision of
1 a by-law of an insurance company that in case of the failure of the
adjuster and insured to agree upon the amount of a loss and the
liability of the company, the matter should be referred to the direct-
ors of the company for final adjustment, does not make a decision of
the directors final; but the insured may appeal to the courts to
determine the liability of the association.

Trial: EVIDENCE TO BE CONSIDERED BY JURY: INSTRUCTION. A jury
2 must try a cause and base its verdict upon the evidence adduced.
It is not proper for them to consider their own observation and
experience with reference to the subject of the action, except in the

matter of weighing the evidence submitted; and in a case where it was claimed that the stock were killed by lightning, an instruction of the trial court that the jury might properly consider their own observation and experience, if any, with reference to losses of that nature was erroneous.

Weaver, J., dissenting.

Appeal from Guthrie District Court.—HON. J. H. APPLEGATE,
Judge.

THURSDAY, DECEMBER 12, 1912.

ACTION to recover upon policy of insurance against loss or damage by lightning to certain live stock. There was a judgment for plaintiff, and defendant appeals.—*Reversed.*

F. O. Hinkson and Sayles & Taylor, for appellant.

Milligan & Moore, for appellee.

DEEMER, J.—Among the live stock covered by the insurance against lightning was a certain black mare which met its death on or about September 13, 1910. It is the claim of the plaintiff that the animal was killed by lightning, and that under the terms of the defendant's contract he is entitled to demand and recover thereon the sum of \$100. The defendant admits the issuance of the policy, that it was in force at the time of the loss of the mare, that the mare was of the reasonable value of \$100, and that proofs of said loss have been waived by the company. It further admits that it has rejected plaintiff's claim and refused to pay the value of the property alleged to have been lost. It denies, however, that the mare was killed by lightning, and pleads that said company is a co-operative insurance association, which is made up of the owners of the property insured by its policies, and that losses incurred are paid by assessment upon

said members in proportion to the amount of insurance carried by them, and all persons so becoming members are bound to observe and abide by the rules and regulations adopted for the government of its business. It is further alleged that by the regulations adopted by said company it is provided that, where a loss occurs, and the adjuster of the company and the insured fail to agree as to the amount of loss or damage suffered or concerning the question whether the company is liable at all, then the dispute must be referred to the company's board of directors for final adjustment, and that under this rule or regulation, the matter of plaintiff's alleged loss having become a subject of controversy between him and the adjuster, he was duly notified to meet with the board of directors on September 21, 1910, for the purpose of considering his claim. It is further alleged that plaintiff did attend said appointed meeting and presented his claim and his evidence and proofs of loss, upon consideration of which the board of directors voted to reject the same and refused to make payment demanded. Upon this showing defendant says that, plaintiff having elected to submit his claim to the board of directors, and said board having acted thereon and found no liability on part of the company, he is now estopped to maintain this action.

1. Concerning the merits of the question whether plaintiff's animal was in fact killed by lightning, we think sufficient to say that the testimony was such as to require its submission to the jury.

II. The by-law or regulation upon which the defendant relies reads as follows:

This association will not pay for stock killed by lightning, unless the loss has been brought to the notice of the nearest adjuster in five days, who shall immediately notify the secretary, and as soon as practicable, proceed to adjust the loss. If this cannot be done in a reasonable time, the owner shall have two disinterested parties examine the animal and if there are no positive marks of lightning on the outside, then examine under the skin, until marks are found, or it is proven

there are none, and report the facts to the adjuster. The president, secretary, and directors are the adjusters for the association. In case the loss exceeds \$200.00 there shall be two adjusters called, one of whom shall be the president or secretary. Should the adjuster and the assured fail to agree as to the amount of the loss or damage or as to whether there is any liability at all, the matter shall be referred for final adjustment to a meeting of the board of directors, said meeting to be called by the president within ten days after notice of such disagreement.

It appears from the evidence that plaintiff, upon discovering the death of his mare, at once notified the company of his loss, and on the same day the president and secretary visited plaintiff's farm. After making some

1. INSURANCE:
adjustment of
loss; by-law
provision.

investigation, they announced their conclusion that the loss had not been occasioned by lightning, and that the defendant was not liable therefor upon its policy. In this conclusion plaintiff refused to acquiesce and was told that a meeting of the board of directors would be held on Wednesday of the next week at which the claim would be considered. On the day named the directors met, and plaintiff appeared before them asserting his claim, some of his neighbors upon whose corroboration he relied were also present and made their statements; but the board, reaffirming the action taken by the president and secretary, denied the liability of the company and refused payment of the loss. It is now insisted for the defendant, that, plaintiff having elected to appear before the board of directors to obtain adjustment of his alleged loss, the decision there made must be given the effectiveness and finality of an adjudication by a court of competent jurisdiction, and no further action for recovery upon the policy can be maintained. The trial court overruled this objection and did not err in so doing. Whether it be possible for a corporation or association to devise a scheme or plan by which it shall itself be judge and jury to adjudicate the question of its own liability upon its own contracts to the exclusion of the judicial tribunals provided

by law we need not now stop to consider, for, even if we assume that such a thing is legally conceivable, we are very certain it is not to be found in the law above quoted. The evident purpose of this provision is to promote adjustment and settlement of losses without litigation, and to that end, if the claimant and adjuster sent out to make investigation shall fail to reach an agreement, a further hearing and consideration by the board of directors are provided for. Though the by-law speaks of this hearing as a "final adjustment," this cannot fairly be construed as a final and conclusive determination of the right to recover on the policy, but rather as the final effort to adjust or settle the claim amicably. Neither the adjuster nor the board of directors in such case acts judicially. Their attitude is that of representative of the association making inquiry to satisfy themselves whether the loss is within the terms of the policy, and their final determination to reject the claim is not an adjudication of plaintiff's right to recover, but is rather their final conclusion that the proofs offered are insufficient to justify them in making payment without suit.

Nor do we find anything in our cases or the policy of our own statutes or system of procedure to sustain the proposition that the effort of plaintiff to obtain payment of his loss by amicable adjustment operates as an election of remedies to bar him from seeking relief in the courts. To thus penalize negotiations for the private adjustment of disputed claims is not to lessen litigation, but to multiply it. There is nothing in this provision for settlement by adjusters or by the board of directors which brings the case within the rules or precedents applicable to the arbitration of disputes, or to contracts by which matters merely incidental or collateral to the performance may be referred to the decision of a designated third party. The by-law in question does not attempt to prohibit resort to the courts, and such effect is sought to be deduced only by way of argument or inference from the use of the phrase "final adjustment." For the reasons sug-

gested, we are not disposed to adopt that construction, and therefore hold that the court correctly overruled appellant's motion for a directed verdict.

III. In one paragraph of the court's charge the jury was told that, in determining whether the animal was killed by lightning, they were not at liberty to indulge in mere speculation or conjecture, but that they could properly consider their own observation and experience, if any, with reference to losses of that nature. This was excepted to, and the giving thereof is now assigned as error. In our opinion the instruction cannot be sustained, and in giving it the court committed an error which was prejudicial to the defendant. A jury is to try a case on the evidence adduced, and not upon personal knowledge. *Clarke v. Robinson*, 44 Ky. (5 B. Mon.) 55. Of course, in weighing testimony, the jurors may use the knowledge and experience which they possess in common with mankind in general; but it is not proper for some of them having special knowledge of a subject, either to state this knowledge to their fellow jurors, or to act upon it in arriving at a verdict. If such a course were permitted, no record could be made of the testimony on which the case was decided, and the information upon which the jury acted would come from unsworn witnesses. If this were not the rule, there would be no necessity in many cases for introducing any testimony at all upon a given proposition, for some of the jurors might have special knowledge or experience with reference to the subject which he could detail to his fellows, and this would be the foundation of the verdict. Moreover, all cases are to be tried upon the testimony adduced, and jurors are permitted to use the knowledge and experience possessed by mankind in general in weighing that testimony. If this were not the rule, a case could be tried upon common knowledge and experience without the introduction of any testimony. The rule that in weighing the testimony of experts a jury is not bound to receive it as final has no application

2. TRIAL: evidence to be considered by jury: instructions.

here. If no testimony is given by experts at all, surely a jury cannot render a verdict based upon their own knowledge alone. This has so many times been held that there is no need for citing authorities upon the proposition. And for a much stronger reason it is highly improper for any of the jurors to consider and found a verdict upon the special knowledge or observation of some of its members. The authorities are but one way upon this proposition. In *Douglass v. Trask*, 77 Me. 35, an instruction to a jury to infer the facts from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," was held erroneous. An instruction that "the jury may call into requisition their practical experience and knowledge relating to cattle of this kind" is erroneous. *Page v. Alexander*, 84 Me. 83 (24 Atl. 584). See, also, to the same point, *Karrer v. City*, 142 Mich. 331 (106 N. W. 64).

Upon request a jury should be instructed that the case should be tried upon evidence given, and not upon information that one or more of the jurors may have outside of the record. *Citizens' St. Ry. Co. v. Burke*, 98 Tenn. 650 (40 S. W. 1085). An instruction not limiting jurors in their finding of facts to the testimony in the case was held erroneous in *Goulding v. Phillips*, 124 Iowa, 496. An instruction that the jury should use their own judgment as to the value of services was held erroneous in *Wood v. Barker*, 49 Mich. 295 (13 N. W. 597). It is error to tell a jury to use their own judgment, experience, and knowledge in determining what would have prevented a fire. *Burrows v. Delta Co.*, 106 Mich. 582 (64 N. W. 501, 29 L. R. A. 468). It is error for a juror to state in the jury room his own knowledge of facts bearing upon material issues. *Hathaway v. R. R. Co.*, 97 Iowa, 747. A jury cannot, of their own knowledge, determine in how short a distance a train can be stopped. *Union Pacific R. R. v. Shannon*, 33 Kan. 446 (6 Pac. 564). An instruction authorizing a jury to take into consideration their own experience and observation regarding the matters under trial in addition to

the evidence is erroneous. *Chicago, R. I. & P. R. R. v. Cemetery Ass'n*, 57 Pac. 253.

In *Waite v. Teeters*, 36 Kan. 604 (14 Pac. 146), the court said:

The next objection made by the plaintiff in error is the following instruction: 'That the measure of damages, if you find that the corn was converted, was the value of the corn as it stood in the field at the place and time of conversion, and, in arriving at such value, you may take into consideration the kind and character of the corn, the number of acres, where it was situated, and all the circumstances of the case; and you have also a right, in arriving at the value of the corn, to call to your aid what knowledge you possess in common with mankind generally.' As the evidence is presented here, we think that part of the instruction which directed the jury that they might use their own knowledge in determining the value of that particular corn was misleading and erroneous. The value of the corn was to be determined as it stood in the field, and at the time the alleged conversion occurred, which was September 10, 1884. It was then unripe and unharvested, and no witness undertook to state what it was then worth. Not a syllable of testimony was offered in regard to its value per bushel, by the acre, or other measure, in that neighborhood, or in fact anywhere. The case cited, of *Railroad Co. v. Richards*, 8 Kan. 101, correctly decides that in making up their verdict the jury are to use the knowledge and experience which they possess in common with mankind generally; but the court there distinctly says that the jury cannot use and apply the knowledge they may have of the particular case on trial; and that, if any juror has such knowledge, he should be sworn. Here the court directed the jury that they might use their knowledge in finding the value of this particular corn, standing unripe and unharvested in a place somewhat remote from a general market. There was testimony offered of the quality and location of the corn, and the jury could take notice that corn such as that described was of some value, and this would have justified a finding of nominal value; but from the verdict we see that far more than nominal damages were allowed. The jury could apply their general knowledge and experience to the facts in arriving at a conclusion upon many other matters; but the value of unripe corn standing in a particular field, somewhat distant from a railroad and a market, was not common knowledge, and was a fact to be proven in the case. The jury, collected, as

it probably was, from all occupations, may have been constituted, in part, from farmers resident in the locality, who were conversant with the demand and supply of corn like that in controversy, and also of other facts sufficient to enable them to form a correct opinion upon its value; but such information is special, and not common to even other members of the jury following different occupations, and who resided in other parts of the county, and can be used only when given in testimony. *Union Pac. Ry. Co. v. Shannon*, 33 Kan. 446, (6 Pac. 564;) *Railroad Co. v. Richards*, 8 Kan. 101.

In *Gibson v. Carreker*, 91 Ga. 617 (17 S. E. 965), the court, by Lumpkin J., said: "It was certainly error to charge the jury that, in ascertaining the value of the lands at the time of the breach of the bonds, they might consider not only the evidence, but their own knowledge as to the value of land in the country. Juries should decide questions of fact according to the evidence introduced before them, and their personal knowledge certainly cannot constitute a part of the evidence. This is so obvious that we deem a further discussion of this subject unnecessary." See, also, *Bowman v. Foundry Co.*, 226 Mo. 53 (125 S. W. 1120); *Hale v. State*, 122 Ala. 85 (26 South. 236); *Northern Supply Co. v. Wangard*, 123 Wis. 1 (100 N. W. 1066, 107 Am. St. Rep. 984); *Burrow v. Transfer Co.*, 106 Mich. 582 (64 N. W. 501, 29 L. R. A. 468).

In view of such an array of cases, which are sound in their reasoning, it is impossible to sustain the instruction complained of without making a bad precedent. It must always be assumed, no matter what the fact may be, that a jury follows the instructions of the court, and if that be true the verdict here may have been founded upon the special observation or experience of some of the jurors with reference to animals killed by lightning, and not upon the testimony adduced with reference thereto. That such would not be the general knowledge and experience of mankind is clear. The defendant introduced expert testimony to show that the dead animal had none of the characteristic marks or signs indicative of death by lightning, and this in the nature of things was all that it

could do. This testimony could, under the instruction complained of, have been easily overthrown by statements of some juror that he had observed the marks on animals killed by lightning, and that no such marks were the accompaniment of death by lightning. If that were the case, then it is manifest the verdict would not have been based upon the testimony adduced. Had the instruction limited the jurors in weighing testimony to their own personal observation and experience, it might not have been so bad, but it did not do so, and in this respect there was manifest error.

For the error pointed out, the judgment must be, and it is, *Reversed*.

WEAVER, J. (dissenting).—I am unable to agree that the trial court erred in giving the instruction discussed in the third paragraph of the foregoing opinion. On the contrary, when construed as it should be in connection with the entire charge of the court, it announces a rule of law which is both sound and wholesome. The record shows that the defense relied for the most part on evidence of an expert or opinion character that the marks said to have been found upon the body of the dead animal did not indicate it had been struck by lightning. In different paragraphs of the charge the court expressly warned the jury that the burden was upon the plaintiff to establish his claim by a preponderance of the evidence, and in the same paragraph, and in connection with the very language criticised by the majority, the court told the jury that its verdict must be found *from the evidence offered and submitted to the jury*. This was repeated so often and so clearly that to say confusion or misunderstanding could have arisen in the minds of the jurors concerning this elementary rule is an impeachment of their sanity. But the testimony was wholly of a circumstantial character. No one saw the animal killed. It was the claim of the plaintiff that the marks upon the body indicated death by lightning. This the defendant denied, and offered in evidence the opinion of the witnesses

based upon their experience and observation to the effect that such marks did not indicate injury by lightning. It was then proper for the court to instruct upon the subject of expert evidence, and in connection therewith I think the statement in such instruction was not erroneous. Jurors are not required to accept the mere opinion of any witness, even though undisputed. This is especially true where the subject-matter of the opinion has reference to a fact or condition which is as likely to have fallen within the observation of the average juror as of the witness who assumes to speak from expert knowledge. In such cases it has frequently been held that the jury is entitled to exercise its own judgment upon the question so presented, even though the expert testimony is contradicted. Familiarity with the effect of lightning strokes upon the bodies of animals is not a thing known only to students of science or insurance agents and adjusters. It is a matter open to the observation and experience of the average man, and especially of the average farmer, everywhere. Jurors to whom such a question is submitted may and must exercise their own judgments in determining whether to accept an expert opinion as correct. The judgment which they are thus to exercise is the quality of mind which enables them to consider and compare and discriminate with respect to the values and relations of things and to reach just conclusions from given states of facts. The facts upon which they are to thus pass as jurors are to be found in the evidence alone, but the judgment which they are to exercise in rendering their verdict is a judgment enlightened not alone by the evidence or by matters of knowledge common to all men, but also by the matters common to the knowledge and experience of the jurors themselves. Either I misread the authorities, or the majority is wrong in saying the "authorities are all one way" in holding the rule of the instruction erroneous. For example:

Chief Justice Shaw has said: "Juries would be very little fit for the duties of the high and responsible office to which they are called, especially to make an appraisement

which depends upon knowledge and experience, if they might not avail themselves of these powers of their minds, when they are most necessary to the performance of their duties." *Patterson v. Boston*, 20 Pick. (Mass.) 166.

On another occasion the same distinguished jurist used these words: "The jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry. In the present case the jury was not bound by the *opinion* of the witness." *Murdock v. Sumner*, 22 Pick. (Mass.) 156.

Citing these precedents approvingly, the Supreme Court of the United States has said: "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services." *Head v. Hargrave*, 105 U. S. 45 (26 L. Ed. 1028).

In *Lafayette v. Olsen*, 108 Fed. 340 (47 C. C. A. 367, 54 L. R. 33), it was held that, in considering the opinion of an expert concerning a defective plank which was the alleged cause of injury, it was competent for the jurors to make use of *their own knowledge and experience*. A similar instruction was upheld in *Beveridge v. Lewis*, 137 Cal. 628 (67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188).

Mr. Elliott, in his work on Evidence 1046, states the rule thus: "The effect of expert evidence or opinion rests entirely with the jury, and the jurors may apply *their own experience and knowledge* and exercise their own independent judgment upon the facts in evidence in reaching their conclusion." Bearing upon the same proposition, see *Manning v. Railroad Co.*, 166 Mass. 230 (44 N. E. 135); *Green v. Chicago*, 97 Ill. 370; *Stevens v. State*, 3 Ark. 66; *Houston v. State*, 13 Ark. 66; *McGarrahan v. Railroad Co.*, 171 Mass. 211 (50 N. E. 610); *Hayes v. Wagner*, 220 Ill. 256 (77 N. E. 211); *Wills v. Lance*, 28 Or. 371 (43 Pac. 384, 487); *Haight v. Vallet*, 89 Cal.

245 (26 Pac. 897, 23 Am. St. Rep. 465); *Nybach v. Lumber Co.*, 48 C. C. A. 632 (109 Fed. 732).

The United States court, after recognizing the general proposition that jurors must find their verdict from the evidence alone and may not arbitrarily discredit an unimpeached witness, adds that "no such obligation attaches to witnesses who testify merely to their own opinion, and the jury may deal with it as they please, giving credence or not as *their own experience* or general knowledge may dictate." *The Conqueror*, 166 U. S. 131 (17 Sup. Ct. 518, 41 L. Ed. 937). To the same effect, see *Buckalew v. Railroad Co.*, 107 Mo. App. 575 (81 S. W. 1176); *Railroad Co. v. Baltimore*, 98 Md. 535 (56 Atl. 790); *Parks v. Boston*, 15 Pick. (Mass.) 209; *Stevens v. State*, 3 Ark. 66; *McGarrahan v. Railroad Co.*, 171 Mass. 211 (50 N. E. 610).

In the last-cited case the court says that the jury take with them to the jury room "*their knowledge and experience* of affairs, and are not only at liberty to use the same in drawing conclusions from the evidence, but ought to make use thereof. This rule certainly has the saving grace of common sense." Honest jurors ought not to be asked or instructed under any condition of the record to treat or give effect to the opinion of any witness as the truth when they know from their own knowledge and experience it is *not* true. If, for instance, a witness testifies without contradiction that a locomotive of given pattern and weight running at a stated speed on a level track cannot be brought to a stop within less than 1,000 feet, and there is upon the jury one or more practical locomotive engineers who know from actual experiment that the stop may be made in 600 feet, it would be a gross parody on the forms of justice to hold that such jurors, in reaching their conclusions upon the merits of the case, may not consult their own judgment, as enlightened by their own experience, and in reliance thereon reject the testimony which they know to be false or mistaken, even though not contradicted on the trial. The instruction which is condemned by the majority,

when fairly read in connection with the record and in charge as a whole, is well supported by the authorities to which I have referred. The rule for which I contend does not operate as the majority seems to think to make the jurors witnesses in the case or to make evidence of particular facts coming within their knowledge and experience. It does no more than to say, that, if the intelligence and judgment of the jurors have been enlightened by their own experience and observation, they are not required to lay aside these qualifications in performing the duty for which they are impaneled. The rule is not only reasonable in itself, but it would seem unavoidable unless we are to reduce jury trials and the matter of jury instructions to an absurdity. What the jurors have seen, known, and experienced in their own lives and observations concerning the cause and effect of given or stated conditions is an inseparable part of their being. It is that which qualifies them to exercise judgment, and affords the only just basis for confidence in the correctness and integrity of the opinion or conclusion registered by their verdict. The verdict is none the less based upon the evidence and the evidence alone because in reaching it jurors have brought that evidence to the test thus indicated.

While I regret the conclusion announced in the majority opinion, I am glad to believe that it cannot result in widespread mischief. For however solemnly we may declare the rule so approved, and however faithfully the trial courts may go through the perfunctory routine of repeating it in their instructions, juries will continue just the same to test the truth and values of expert testimony concerning matters which are not of an abstruse or scientific character by the touchstone of their own experience and observation.

I think the judgment of the trial court should be affirmed.

C. E. Low, Appellant, v. YOUNG, MULLARKY & LONG and
HENRY YOUNG, H. MULLARKY, G. I. LONG and T. F.
WATT.

Contracts: CONSTRUCTION. Where an instrument is partly written and
1 partly printed, the written portion will control in case of apparent
inconsistency.

Same: CONTRACT AFFECTING REAL PROPERTY: OPTION: ESTOPPEL. Where
2 an agreement respecting the sale of real estate amounts simply to an
option to purchase and not a contract of sale, failure to make pay-
ments as provided therein is an abandonment of all further rights
thereunder; and the serving of notice of forfeiture after the breach
would not amount to an estoppel of the right to rely on the conten-
tion that the instrument was merely an option. The agreement in
this case is held to have been merely an option.

Appeal from Buena Vista District Court.—HON. A. D. BAILIE,
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION in equity to enforce specific performance of an
alleged contract to convey land, with the additional prayer
that if specific performance is impracticable plaintiff have
relief against defendants by way of damages. There was
a decree for defendants, from which plaintiff appeals.—
Affirmed.

James Deland, for appellant.

*V. P. McManus, Kelleher & O'Connor and Faville &
Whitney*, for appellees.

McCLAIN, C. J.—On March 17, 1910, the plaintiff, as a
real estate broker, entered into a written agreement with the

defendants Young, Mullarky, and Long with reference to a purchase, or a prospective purchase, by plaintiff of a farm owned by said defendants as tenants in common. This contract provided for payment of a considerable portion of the purchase price within sixty days; \$50 being paid in cash. The terms of the contract as to payment were not carried out, and said defendants, in June following, entered into a contract with defendant Wait for the sale of the land to him. It is now conceded for plaintiff that the contract on which he sues was not recorded until after the contract between Wait and the defendants was entered into, and therefore that Wait, having purchased without knowledge or notice of the contract with plaintiff, must be protected as against it. The sole controversy, therefore, is as to whether plaintiff is entitled to recover damages against the defendants Young, Mullarky, and Long for breach of their contract with him.

Substantially, the controversy between plaintiff and the defendants Young, Mullarky, and Long, who will be hereafter referred to as the defendants, is as to whether the written contract entered into between plaintiff and defendants was a mutually binding agreement of purchase by plaintiff, for breach of which defendants must answer in damages, or whether, on the other hand, it secured to plaintiff only an option to purchase the land, on terms specified, within sixty days, and by its own terms became void and inoperative on the failure of the plaintiff to exercise such option to purchase within the time specified.

The written instrument referred to consisted of a printed blank, embodying the usual provisions of a contract of sale of land, with certain stipulations written in blank spaces left for the purposes of specifying the description of the property, the names of the parties, and the terms of payment. Without setting out the contract in full, it is sufficient to say that the consideration was stated to be \$18,000, of which the plaintiff had paid \$50, and that plaintiff agreed to assume a mortgage on the land for \$8,000, give a note for \$3,000, secured by

second mortgage on the land, payable in five years, and another note for the balance of the purchase price, payable on or before sixty days. Following these provisions, there was written into the printed blank the following stipulation: "If said note of nine thousand nine hundred and fifty dollars is not paid when due this contract is null and void. Second party forfeits his fifty dollars paid; and first party refunds notes given by second party. It is agreed that tile now on said land, not laid, shall be property of second party."

Applying the well-recognized rule that in construing instruments partly printed and partly in writing, if there is apparent inconsistency between the printed portions and the

portions in writing, the provisions in writing shall be given controlling significance (*Sylvester v. Ammons*, 126 Iowa, 140), we reach the conclusion that the written stipulation above set out provided for an option only, which plaintiff might exercise within sixty days, and that the printed portions of the contract having reference to a binding sale by defendants to plaintiff were superseded by this stipulation inserted in writing.

The prior negotiations of the parties, and their interpretation of the contract between them, may, of course, be taken into account in determining the effect of the entire contract

as executed, in view of the inconsistency appearing therein; and we have no hesitation in reaching the conclusion that, in view of the circumstances under which the blank contract was filled out and signed, and the subsequent practical abandonment of the written contract by plaintiff, indicated by his proposal to defendants to effect a sale of the land for them to another party on wholly different terms from those embodied in the contract, it was the intention of the parties to enter into an agreement which would give to the plaintiff nothing more than an option—failure to comply with the stipulations being, as a matter of law, an abandonment of all further rights thereunder.

2 SAME: contract affecting real property: option: estoppel.

As against this conclusion, which was the one drawn by the trial court from the writing and the oral evidence as to the conduct of the parties, counsel for appellant insists on substantially two propositions of fact: First, that the defendants have by their acts estopped themselves from claiming that the contract provided only for an option by subsequently serving on plaintiff a notice of forfeiture in accordance with provisions of Code, section 4299, relating to contracts for the purchase of real estate, and, further, that such estoppel has arisen in plaintiff's favor, as against defendants, by the action of defendants in allowing plaintiff to incur expense in reliance on the contract after the term of the option had expired; and, second, and without regard to a technical estoppel, that defendants, having elected to treat the contract as one of purchase, cannot now mend their hold by assuming another and inconsistent position with reference thereto.

As to the alleged estoppel, it is sufficient to say that the merely precautionary measure of serving notice, in view of the possible construction which might be contended for by plaintiff, would not, in itself, constitute an estoppel of the defendants to rely upon their construction of the terms of the contract. Such notice was not served until after defendants had, as plaintiff well knew, entered into an agreement for the sale of the land to Wait; and nothing appears to have been done by plaintiff in reliance on such notice, save to attempt to insist upon his own construction of the agreement. It nowhere appears that if this notice had not been served plaintiff would have recognized the contract as providing for an option only, and abandoned further effort to enforce the contract under the construction which he placed upon it.

Whatever plaintiff may have done in attempting to effect a sale of the property to another purchaser, and on other terms, was plainly, in view of the correspondence between the parties, done in the hope of securing some advantage by way

of commission or otherwise in bringing about a sale which would be satisfactory to the defendants. Such negotiations rather confirm than negative the construction of the contract insisted upon for defendants, under which the rights of plaintiff to exercise his option had fully terminated by expiration of time.

The suggestions already made practically dispose of the contention that appellees, having elected their remedy under the instrument, are foreclosed from now taking the inconsistent position that it provided only for an option, which had become forfeited when such election was made. The case is not one involving election of remedies, but one involving the construction of the contract itself, and in view of this situation the doctrine as to election of remedies has no application.

The decree of the trial court was right; and it is therefore *Affirmed.*

PORTABLE ELEVATOR MANUFACTURING COMPANY, Appellant, v.
BRADLEY, MERRIAM & SMITH.

Sales: CONTRACT: BREACH. Under a jobber's contract for the exclusive
1 sale of machinery for a certain time and in certain territory, the machinery to be furnished as listed, and the jobber to use good business methods to effect sales, and in view of the evidence that both parties knew it was customary to take orders for future delivery, and that canvassing the territory was the proper method of procuring trade in that line of business, refusal to furnish machinery for which orders were taken during the life of the contract but to be delivered thereafter, was a breach of the contract.

Same: MEASURE OF DAMAGES. Where it appeared that the expense of
2 substituting other machinery for that sold, caused by defendants breach of the contract to furnish the same, was as great as that incurred in procuring the original orders, the plaintiff was entitled to recover as damages the profits that would have accrued from filling the original orders; and where the amount allowed was less than the proper measure of damages there was no prejudice to the defendant in awarding the expense of obtaining the orders.

Appeal from Pottawattamie District Court.—HON. E. B.
WOODRUFF, Judge.

FRIDAY, DECEMBER 13, 1912.

THE parties agreed upon the amount owing on the account sued on, but from judgment awarding recovery on the counterclaim the plaintiff appeals.—*Affirmed.*

Saunders & Stuart and Francis A. Brogan, for appellant.

Tinley & Mitchell, for appellee.

LADD, J.—The parties agreed that \$1,735.34 was due plaintiff for goods furnished the defendant in pursuance of a contract. The controversy arises on the counterclaim in which defendant claims damages suffered in consequence of an alleged breach of said contract, in that plaintiff failed and refused to deliver to defendant certain machines and attachments for which orders were obtained prior to its expiration be delivered thereafter. This agreement was entered into November 21, 1907, and therein the plaintiff, as party of the first part, granted “unto the party of the second part (defendant) the sole and exclusive sale of their entire line of portable wagon dumps and elevators, conveyors, dragages and horse powers” in certain defined territory “for a period of one year.” Plaintiff undertook not to ship or sell such machines in said territory “during the existence of the contract, unless upon the written consent of the party of the second part,” and that it would “make prompt and satisfactory shipments or delivery of all goods ordered by party of second part.” The defendant agreed “to buy one hundred and fifty standard machines for the season of 1908, specifications to be furnished in sufficient time before Nov. 1, 1908, for their manufacture

and shipment." The fifth clause contains a guaranty, and the sixth stipulates that "all of the 'little Giant grain dumps,' elevators, conveyors, and drages are to be furnished complete as called for in 1908 catalog and price list of said manufacturers as attached to this contract and marked 'Exhibition A.' Seventh. Party of the first part agrees to sell party of the second part all machinery at a discount of 35 per cent. from their price list of 1908." Following was a price list of attachments, after which the contract proceeds: "All shipments made prior to October 1st, 1908, payable four months from October 1st, subject to a cash discount of one (1) per cent. per month for all anticipated payments, but not to exceed a total of three (3) per cent. cash discount. Shipments after October 1st to be four months from shipment, subject to a cash discount of one (1) per cent. per month for anticipated time, but not to exceed three (3) per cent. cash discount. The said party of the second part for and in consideration of the promises and undertakings of party of the first part, hereby covenants and agrees as follows: First. To fully canvass and work for the trade in the territory assigned by using all good business methods to promote the sale of the goods herein mentioned, and not to handle or offer for sale, other portable dumps and elevators, conveyors or drages; nor to sell outside of said territory except by consent of said party of the first part. Second. To make settlements promptly and in accordance with the terms hereinbefore mentioned." The remainder of the agreement relates to repairs and extras which were to be settled for December 1st of each year.

As the contract was not renewed or extended, the defendant prayed for allowance on the counterclaim for damages suffered in consequence of plaintiff's refusal to furnish articles to fill the orders taken prior to November 21, 1908, the time to which the right of exclusive sale was granted, but to be delivered thereafter. The evidence disclosed that plaintiff manufactured the various articles to be furnished under the contract, and that defendant was a jobber supplying local

dealers or retailers, and that prior to the expiration of the year during which the exclusive right of sale was granted defendant had taken forty-four orders for machines from local dealers within the stipulated territory. At their settlement in December following, plaintiff's attention was directed to these orders, but, having entered into a similar contract with another concern, it declined to furnish machines and attachments to defendant with which to perform its obligations assumed in accepting the orders.

But two matters are argued: (1) The construction of the contract; and (2) the measure of damages.

I. The language of the contract indicates that the implements were of a particular make or type, and were manufactured and supplied to jobbers as demanded.

1. SALES: contract: breach.

Such demand is measured by the call from jobbers, who, in turn, necessarily rely upon orders from retailers. The right to the "sole and exclusive sale" was limited to one year, or ended November 21, 1908. This had reference to the negotiation of sales by defendant with the local dealers. Were completed sales only contemplated or such executory sales as ordinarily are made by jobbers in the usual course of business in that particular line? This may be ascertained from the relations of the parties, the manner of transacting business between the jobber and retailer and especially by comparison with another portion of the contract. Plaintiff manufactured the implements enumerated and defendant was engaged in soliciting trade from and supplying retailers with these and other implements. This was done by taking orders from the retailers for future delivery, six to twelve and sometimes eighteen months hence, and especially was this true with respect to the articles manufactured by plaintiff, as the demand for their use was in the fall of the year. This method of doing business was understood by both parties. The other clause of the contract alluded to obligated defendant to "fully canvass and work for the

trade in the territory assigned by using all good business methods to promote the sale of the goods herein mentioned." How was this to be done? By soliciting the trade from retailers and procuring from them orders of goods, and this must have been so understood, for it appears to have been the only method of canvassing and working for trade in this line of business. Indeed, an officer of plaintiff in charge of its business with defendant testified that he "understood that the proper handling of business of that kind required canvassing for future business." When was the canvassing and work for trade in the territory to cease? At the end of the year. Until that time, November 21, 1908, the defendant was not only bound to canvass and work for trade by the use of all good business methods, but prohibited from handling or offering for sale other articles of the kind. This, as said, involved soliciting business from the retailers and taking orders for future delivery according to the usage of the business being carried on up to the end of the year. Can it be that, though bound to solicit and enter into contracts with retailers for the sale of the implements in question up to the end of the year, this was to be done notwithstanding the impossibility of performing them within that time, and without assurance that they might be performed thereafter? And yet defendant must necessarily have been in this predicament were the construction contended for by plaintiff to be adopted. The time within which goods must have been ordered from or delivered by plaintiff is not restricted in the agreement, unless by the period defined for the "sole and exclusive sale" by defendant to the retailers, and this, as we think, in view of the duty of defendant to canvass for and take orders throughout the period, must be construed to have reference to the procurement of those executory contracts evidenced by accepted orders from retailers. Refusal then to furnish machinery and attachments to fill such orders was a breach of the contract on which damages were recoverable.

II. The implements were of a designated manufacture.

The defendant must have delivered these in order to perform its contracts with retailers. Though there may have been others of similar device, they were not such as had been contracted, and, though defendant was able to substitute some of another make in place of those ordered, the evidence that this involved as much expense and trouble as in procuring the original orders was undisputed. That the implements could not be supplied from the general market disposes of the authorities relied on by appellant. The defendant was handling these implements in order to acquire the profits to be obtained from supplying the local dealers, and, as by the breach of the agreement the defendant was deprived thereof, these constituted the damages which the latter was entitled to recover. *Hichhorn v. Bradley*, 117 Iowa, 130; *Rule v. McGregor*, 117 Iowa, 419; *Black v. Ry.*, 122 Iowa, 36; See *Iowa-Minnesota Land Co. v. Conner*, 136 Iowa, 674.

As the amount allowed by the court was less than this measure authorized, there was no prejudice to appellant in awarding the expense of obtaining the orders only.—*Affirmed*.

JAMES KANE V. JOHN W. TEMPLIN, et al., and GEO. W.
SPEIDEL, Appellants.

Real property: EASEMENTS BY IMPLICATION. The devisees of property
1 take title by purchase, and so far as easements are concerned their rights are the same as those of any other purchaser. So that where a building was devised to different parties, in one part of which and adjoining the dividing line there was a stairway and hall designed and used for the mutual convenience of the occupants of the entire building, the grantees of the part adjoining the stairway and hall acquired an easement therein by implication, and the grantees of the other part took title subject to such easement.

Same: Easements by implication are limited to such rights as in the
2 nature of the case must be presumed to have been in the minds of

the parties concerned, appurtenant on the one hand and servient on the other; and necessity for the convenient use and enjoyment of the premises to which the easement is claimed to be appurtenant is material in determining whether the easement is to be implied.

Same: An appurtenant easement passes with a description of the property to which it attaches without specific designation; and the purchaser of the servient property takes subject to the easement, without express reservation.

Same: JUDGMENTS: CONCLUSIVENESS. A decree reforming a will so as to correctly describe that part of a building devised to one legatee will not bar the right of the legatee of the other part to subsequently sue for the protection of an easement appurtenant thereto.

Same: ABANDONMENT: EVIDENCE. Mere nonuser of an easement during a time when there was no occasion to use it does not show permanent abandonment. In the instant case the evidence is held insufficient to show abandonment.

Appeal from Johnson District Court.—HON. R. P. HOWELL, Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION in equity to enjoin the defendants from obstructing certain stairways and access to a hall on their premises in the use of which, it is claimed by plaintiff, he has an easement. There was a decree for plaintiff, and the defendants appeal.—*Affirmed.*

Wade, Dutcher & Davis, for appellants.

John J. Ney, for appellee.

McCLAIN, C. J.—About the year 1860, one J. D. Templin was the owner of a parcel of land in the business portion of Iowa City with a frontage of forty feet on the south side

of Washington street and extending southward one hundred and fifty feet to an alley, and erected thereon a two-story brick building of the entire width of the parcel of land and of a depth of about eighty feet. Through the center of this building, extending north and south, was a brick wall from the foundation to the roof, dividing the lower story into two storerooms, each about twenty feet in width, save that out of the east half space was taken for a front and a rear stairway, inclosed, and adjoining the center wall, which stairways gave access to a hallway on the second floor extending the entire length of the building north and south and also adjoining the center wall. There was no access to the front stairway from the west storeroom, but the back stairway was reached from that room through a door near the south end of the center wall. On the second floor, the rooms on the west side of the center wall were reached from the hallway through doors cut in the wall, and on the east side of the hallway were doors into corresponding rooms over the eastern storeroom. Without any substantial change of plan, the front and rear stairways and the hall on the second floor continued to be used for the purposes above indicated until the death of the owner in 1882, when the two portions of the premises passed by devise to different owners; the eastern part of the building being described as the west half of the east half of lot 2 in block 81, and the western part being described as the east half of the west half of the same lot. The title of the plaintiff and the defendants, respectively, to the west half and the east half of the building, rests upon these devises. For the purpose of determining the question presented, no further details as to the title to the respective portions of the property need be set out. The claim of plaintiff as owner of the west half of the building is that, under the devise to his remote grantors of the west half of the east half of lot 2, he acquired the right to the use of the stairways and hall as an easement appurtenant to his portion of the building; while the contention for defendants is that there was no easement

granted in the stairways and hall which are wholly within the limits of the east half of the building, and that the devise of that portion excluded any easement by implication or necessity. There is a further claim for defendants that, if any easement existed at the time the devise took effect, it has been abandoned by the conduct of plaintiff and those under whom he claims.

I. The devisees of the two halves of the building took title as purchasers, and their rights, so far as we can see, were the same as they would have been had J. D. Templin

1. REAL PROP-
ERTY: easements by
implication.

conveyed the west half of the building, that is, the east half of the west half of lot 2, to plaintiff's remote grantors, and at the same time conveyed to others the east half of the building, that is, the west half of the east half of the same lot. If, at the time such conveyances were made, there had existed, in the east half of the building adjoining the dividing wall, stairways and a hallway originally designed and still used, as was obvious to all the grantees, for the mutual convenience of the occupants of the entire building, then, as we think, the grantees of the west half would have acquired by implication an easement in the use of such stairways and hall, and the grantees of the east half would have taken title subject to such easement. *Thompson v. Miner*, 30 Iowa, 386; *Marshall Ice Co. v. La Plant*, 136 Iowa, 621; *Howell v. Estes*, 71 Tex. 690 (12 S. W. 62); *Doyle v. Lord*, 64 N. Y. 432 (21 Am. Rep. 629).

It must be conceded that easements by implication are to be strictly limited to rights which in the very nature of the case must be presumed to have been in the minds of the parties

2. SAME.

concerned, appurtenant on the one hand and servient on the other; and the necessity of the use for the convenient enjoyment of the premises to which the easement is claimed as appurtenant is a material consideration in determining whether such easement is to be implied. Nevertheless, an easement by implication is a different thing from an easement by necessity, as the latter

term is properly used. . *Scott v. Palms*, 48 Mich. 505 (12 N. W. 677). It must be conceded, also, that in some courts easements by implication have been limited to those existing strictly by necessity. See, for example, *Buss v. Dyer*, 125 Mass. 287; *Hildreth v. Geogins*, 91 Me. 227 (39 Atl. 550); *Stillwell v. Foster*, 80 Me. 333, (14 Atl. 731). Much may be said in behalf of this rule; but we think the other rule which recognizes an implied easement as arising out of the method of construction and use of the building, portions of which subsequently pass to different purchasers, has been adopted by this court in the cases already cited.

Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and, on the other hand, the purchaser of the servient property takes subject to the easement without express reservation. *Teachout v. Capital Lodge*, 128 Iowa, 380; *Reed v. Gasser*, 130 Iowa, 87; *Hatton v. Cale*, 152 Iowa, 485; *Stephens v. Boyd* (Iowa), 138 N. W. 389.

We do not undertake to say that, if the building should be entirely destroyed, the plaintiff would have an easement in that portion of defendants' lot over which the stairways and hall are now maintained. No such question is before us. Plaintiff asks only that defendants be enjoined from obstructing his use of the stairways and hallway as they now exist, such use being that to which they were subject at the time title passed under separate ownership by virtue of the provisions of J. D. Templin's will. We think this claim of plaintiff was properly recognized by the lower court.

II. Appellants rely upon a decree in an action to which all the devisees of J. D. Templin were parties as an adjudication in favor of defendants J. W. Templin and others against plaintiff's remote grantor cutting off any right in the east half of the building. But it appears that the action in which such decree was rendered was one in which John W. Templin and his

4. SAME: judgments: conclusiveness.

minor children, who are defendants in the present action, asked that as against the other heirs or devisees of J. D. Templin the will of the latter be so reformed as to correctly describe a certain parcel of land devised to said John W. Templin and his issue as the west half of the east half of lot 2 in block 81, instead of the east half of the west half of said lot, which was in said will devised to a daughter, remote grantor of the plaintiff, and that the right of said plaintiffs to the west half of the east half of said lot under the will as thus corrected be confirmed, and that to remove any cloud from said plaintiff's title the record of the will be made to conform to the correction asked. The decree in that action recites service of notice on defendants therein and default by them, and a finding that said plaintiffs were, under the provisions and conditions of the will, the owners of the west half of the east half of said lot, correcting the will accordingly in that respect, and confirming their title and quieting it as against the defendants in that action. It is clear therefore that plaintiff's remote grantor, as heir of J. D. Templin and devisee under his will, was not called upon to defend her right to an easement by implication in the west half of the east half of the lot which she had by virtue of the devise to her of the east half of the west half of the lot, and that the only effect of the decree was to reform the will and make it effectual to carry out the intent of the testator. In the first division of this opinion the rights of the parties have been determined on the theory of devises of the two halves of the building to different devisees, and that conclusion is not affected, therefore, by the consideration of the decree herein described.

In view of this conclusion, the motion of appellee, submitted with the case, to strike from the record the decree offered in evidence on certain grounds set up in said motion, need not be passed upon, and it is therefore overruled.

III. The evidence relied upon for appellants to show abandonment of the easement by plaintiff's grantors or him-

self seems to us to be quite inadequate. The obstructions of which plaintiff complains, and which he asks to have abated, have not existed for any great length of time and have but recently come to his attention. It is true that for some years the second floor of plaintiff's premises has been occupied by a tenant in connection with the second floor room to the west; communication having been established by an arched opening in the wall with plaintiff's consent, and the entrances from the hall to the east have not been used. But if plaintiff's present tenant for his second floor allows his lease to expire, it will be necessary for plaintiff in all probability to lease the second floor or portions of it to tenants who will desire access by means of the hallway; for there is no other avenue of access in the building to plaintiff's second floor save by the stairways and hallway to which this action relates.

5. SAME: abandonment: evidence.

It further appears that at one time plaintiff's immediate grantor, in leasing the storeroom on the first floor to George W. Speidel, who now, as tenant of the east half of the building, is a defendant in this suit, agreed to construct and did construct for him an inside stairway for reaching the back portion of the second floor. But after occupancy of two or three years, Speidel removed to the east side of the building, and his succeeding tenant of the storeroom on the west side, having no use for the inside stairway, cut it out. Speidel's testimony that, when plaintiff's grantor agreed to construct the inside stairway, he declared that his tenant had no right to the use of the stairways in the east half of the building, is contradicted by the other party to the alleged conversation, and, as the burden of proving abandonment is upon the defendants, we reach the conclusion that no actual or intentional abandonment is made out.

Mere nonuser of an easement of this kind during a period of time within which there is no occasion to use it does not tend to show a permanent abandonment. *Teachout v. Capital Lodge*, 128 Iowa, 380; *Reed v. Gasser*, 130 Iowa, 87.

The decree of the trial court is therefore *Affirmed*.

ELIAS SPENCER v. THE UPDIKE GRAIN Co., Appellant.

Negligence: MASTER AND SERVANT: EVIDENCE. In this action for in-

- 1 jury to an employee by reason of the failure of the rope on a car puller to slacken, evidence that the superintendent of defendant had on former occasions observed that the rope did not work satisfactorily and that it had been necessary to stop the machine on that account, which was not necessary to its proper operation, was admissible to show the defective condition of the machine, and also as bearing on defendant's negligence in failing to warn plaintiff of the danger.

Same: Evidence of witnesses familiar with the operation of a car

- 2 puller, that the clutch on the puller in question was so placed that in managing the rope on the drum plaintiff could not operate it without going around the machine, and if properly placed it would have been within reach and the machine could have been immediately stopped by plaintiff, was admissible.

Same: PREJUDICE: REVIEW ON APPEAL. Where the plaintiff's injury,

- 3 though permanent, was not such as to affect his expectancy of life, the fact that his expectancy as shown was from a date prior to the trial a short time, rather than from the trial itself, was not prejudicial; and if there was any error in its admission it was cured by the instruction of the court. Besides no proper objection to the evidence in this regard was made at the trial.

Same: FAILURE TO WARN: INSTRUCTION. Where plaintiff's injury was

- 4 the result of a defect in the machine with which he was at work, and not of any negligent act of his or of a co-employee in operating the same, submission of defendant's negligence in putting plaintiff to work without warning was proper.

Same: ASSUMPTION OF RISK. Where plaintiff was injured as the re-

- 5 sult of a defective machine which he was operating for the first time, and the defect was not known to him or obvious to an ordinary person without experience, and he did not know that it was unsuitable for the purpose and in the method in which it was being used, he did not assume the risk of danger therefrom.

*Appeal from Harrison District Court.—HON. E. B. WOODRUFF,
Judge.*

FRIDAY, DECEMBER 13, 1912.

ACTION to recover damages for personal injuries received by plaintiff while in the employment of defendant. There was a verdict and judgment for plaintiff, from which defendant appeals.—*Affirmed.*

Greene, Breckenridge, Gurley & Woodrough and Tinley & Mitchell, for appellant.

S. H. Cochran, for appellee.

MCCLAIN, C. J.—Prior to the day of the accident resulting in the injury to plaintiff, he had been in the employment of defendant in unloading grain from freight cars by means of a steam shovel. On that day, for the first time, he was put in charge of a car puller, which was being used at the time to draw cars along the track to the proper place for unloading. The operation involved the use of a long rope, attached by a hook to the car to be moved; the rope being so drawn as to move the car by coiling it several times around a revolving drum. The operator would hold the rope taut back of the drum, and its revolutions would cause the car to be drawn along the track as the drum revolved. The method of discontinuing the application of power to the car was usually, not by stopping the drum, but by allowing the rope to become slack, so that it would slip on the drum. While plaintiff was engaged in handling the rope as it came away from the drum, his coemployee, who was managing the car at the end of the rope, directed him to give slack, and this, for some reason, plaintiff was unable to do, as the drum continued to draw the rope. For the purpose of loosening the rope on the drum, plaintiff took hold of the rope with his right hand in front of the drum, and his finger was caught between the portion of the rope which was being drawn in and the portion which was being coiled on the drum, and was so injured as that

amputation became necessary, and this is the injury for which recovery is sought.

The negligence of the defendant, under the allegations of the petition, which were submitted to the jury, consisted in placing plaintiff in a dangerous place to work, in that the car puller was in such condition that it would not allow the rope to slack, and in placing plaintiff in a dangerous position to work without explaining to him the dangers connected therewith, and in maintaining the car puller without a proper clutch appliance to stop the same. There was an allegation of freedom from contributory negligence, and the defendant, denying all negligence on its part, also alleged assumption of risk.

I. It was material for plaintiff to show that the car puller was in some way defective, and that the defendant had knowledge, or should have had knowledge, of this defective condition. For the purpose of showing that the car puller did not work properly, and that its condition was in some way defective to defendant's knowledge, the plaintiff was allowed to prove that on previous occasions defendant's superintendent had observed the rope becoming tangled in some way on the drum, and that he had found it necessary to throw out the clutch and stop the drum. We think that this evidence was competent. It appeared that in the proper operation of the drum it was not necessary to throw out the clutch, in order to stop the pull on the rope; this being accomplished simply by giving slack to the portion of the rope which was being played off from the drum. If the puller did not, in this respect, operate as was intended, it was either defective, or the method of using it which defendant authorized was not a proper method. The evidence was also competent, as we think, on the question whether plaintiff should have been warned of the danger involved in the rope becoming tangled in some way on the drum.

The cases relied upon for appellant on this proposition

are not in point. In *Croddy v. Chicago, R. I. & P. R. Co.*, 91 Iowa, 598, it was held not error to reject evidence of the previous killing of stock at a railroad crossing, in an action to recover for stock killed at such crossing. It is evident that the previous negligent operation of trains at the crossing in question would have no tendency to show that the particular train, the operation of which was complained of, was negligently operated. In *Potter v. Cave*, 123 Iowa, 98, the question was whether a stairway in defendant's storeroom, down which the plaintiff fell, receiving the injuries complained of, was maintained in a dangerous condition; and it was held error to admit evidence tending to show that complaint had been made to an employee of defendant that it was in a dangerous condition. The complaint was as to the insufficiency of light and of guards, which made the stairway dangerous to persons passing near it. Plainly the actual condition of the stairway as to light and guards was the sole question to be determined in fixing defendant's liability, and warnings as to its dangerous character, conceding that defendant was aware of its condition, need not be shown. The evidence thus offered was prejudicial to the defendant; for evidence as to previous accidents or warnings might be considered by the jury as tending to show that he ought to have adopted precautions which he did not adopt, even though, as a matter of law, the happening of a previous accident, or the giving of warning, would not require any greater care or precaution on his part than that required by the knowledge of the condition of the stairway, with which he was necessarily charged. We think there was no error in the admission of this evidence.

II. The plaintiff was allowed to introduce the testimony of certain witnesses familiar with the operations of a car

puller to show that the clutch was so placed
2. SAME. that the plaintiff, in managing the rope on the drum, could not reach it without going around the machine to do so, whereas, if it had been on the other side of the machine, and within reach from the place where the operator

stood in connection with the use of the machine, the clutch could have been thrown out with safety, so as to immediately stop the drum. This evidence, we think, was properly admitted. It would be difficult to describe to the jury the relations of the portions of the machine to each other, so as to enable them to understand whether the machine would have been safer in its practical operation if the clutch had been differently located. The experts were not asked to say that the defendant was negligent, and thus invade the province of the jury; but they were called upon to explain the fact as to whether, in the matter referred to, the machine was as safe for the operator as it might, in the exercise of reasonable care, have been constructed consistently with its proper and efficient use. This consideration disposes of the cases relied upon for appellant, which hold that a question of negligence is not a subject for expert testimony, but should be left to the jury.

III. As the injury to the plaintiff was permanent, evidence as to his expectancy of life was material. It was contended for appellant that the expectancy of life shown was that of the date of the accident, and not that of the date of the trial, and that the evidence was therefore incompetent, relying upon *Hughes v. Chicago, R. I. & P. R. Co.*, 150 Iowa, 232. But in that case the question was as to the expectancy of life of a person who was, at the time of the trial, not in the condition of health and bodily soundness which had existed before the injury. In this case there was no evidence whatever tending to show that, save for the permanent loss of his finger, plaintiff was not in as sound condition and having as great an expectancy of life as at the time of the injury. Moreover, the admitted evidence did not relate to the plaintiff's expectancy at the time of the injury, but to a date somewhat subsequent to the injury and only five months preceding the time of the trial. The evidence complained of consisted simply of an admission, on behalf of defendant, that at the date specified plaintiff's expectancy of life was fifteen years. Why this date was fixed in the admis-

3. SAME: prejudice: review on appeal.

sion does not appear; but we are justified in assuming that by the admission plaintiff's counsel was reasonably led to assume a concession for defendant that the expectancy of life, at the time of the trial, was that specified in the admission. No complaint was made at the time that the expectancy of life referred to was not the proper one to be considered by the jury. As a matter of fact, the date referred to was the date of the filing of the petition. As no future pain or suffering could, under the instructions, be made the basis of the allowance of damages by the jury, and only impairment of future earning capacity could be considered, we think that the error, if any, was without prejudice; but, whether so or not, the appellant cannot complain, in view of the failure of counsel to object in any way to the admissibility of the evidence that the plaintiff's expectancy of life was fifteen years. Counsel for defendant did, in a general way, object to the evidence as to expectancy of life as incompetent, irrelevant, and immaterial, but in no way pointed out that the objection related to the date as to which expectancy of life was admitted. There was no error in this respect of which appellant can complain.

The complaint of an instruction referring to the concession as to expectancy of life is disposed of by what has already been said. And in such instruction the court practically cured any error as to the evidence of expectancy, so far as it related to the date of its computation; for the jury was told that if plaintiff was found to have been permanently disabled, so as to impair his future earning capacity, he should be allowed "such further sum as will reasonably compensate him for such loss in future earning capacity, if any, as he has shown to have sustained by such accident," taking into account, with many other things, "his expectancy of life, which in this case you are instructed is fifteen years from October 18, 1910." Evidently the damage from impairment of future earning capacity was to be estimated by the jury from the time of the verdict. And the plaintiff's expectancy of life, estimated at a date five months previous and after he had sustained the injury

complained of, could not have been materially different from his expectancy at the date of the verdict. The possible discrepancy was so small that we would not be justified in reversing on account of the alleged error.

IV. The court did not err in submitting to the jury the alleged negligence of the defendant in putting plaintiff to work in a dangerous place without explaining to him the dangers connected with his employment in that place. The alleged unsafety of the work about the machinery did not arise from the negligent act of the plaintiff himself, or of a coemployee in putting the machinery in operation while the plaintiff was in a position to be injured by doing so, but it arose, if at all, from the defective nature of the machinery. Therefore the case of *Peterson v. Chicago, R. I. & P. R. Co.*, 149 Iowa, 496, is not in point. The same suggestions indicate the inapplicability of what is said in *Galloway v. Turner Improvement Co.*, 148 Iowa, 93, where the alleged negligence was not that of the defendant in providing an improper machine, but that of the plaintiff's coemployee in starting it without warning to the plaintiff. In *Sutton v. Des Moines Bakery Co.*, 135 Iowa, 390, it was conceded by the court, rather than denied, that defective machinery renders the place of work unsafe, so far as it threatens injury to an employee who is working about it. The question in that case was whether plaintiff had assumed the risk of working about unsafe machinery, or was guilty of contributory negligence in doing so. In none of the cases cited for appellant is there any indication that defective machinery may not be the basis for finding negligence of the employer in putting the employee at work about it, and render the place where he is thus put to work an unsafe place for work.

V. There was no error in instructing the jury as to the doctrine of assumption of risk and contributory negligence.

4. SAME: failure to warn: instruction. The plaintiff was not familiar with the dangers incident to the handling of the machine about which he was working on the day of the accident for the first time. He was given no warning with

5. SAME: assumption of risk.

reference to such dangers. Therefore he cannot be said to have assumed the risk, unless such dangers were so obvious as to be patent to an ordinarily reasonable person without experience. He did not know that the machine was defective, or in some way unsuitable for the purpose for which it was being used, and in the method in which it was generally used, and therefore did not assume the risk arising from such unsuitableness or imperfection. These suggestions dispose, also, of what is said in argument in regard to failure of warning and contributory negligence. The question whether the accident happened without fault on the part of defendant was, under the pleadings and the evidence, plainly one for the jury.

The judgment of the trial court is therefore *Affirmed*.

FRANK BISSELL, Appellant, v. THE BOARD OF REVIEW OF THE
TOWN OF DUNLAP.

Taxation: LAND CONTRACT: OPTION. A contract respecting the sale of land which amounts simply to an option to buy is not taxable as moneys and credits. In the instant case the provisions of a lease giving the lessee a right to purchase on the payment of a stated sum at a specified time is held to be an option rather than a contract of sale, and therefore not taxable.

Appeal from Harrison District Court.—HON. O. D. WHEELER,
Judge.

FRIDAY, DECEMBER 13, 1912.

IN a proper proceeding before the board of review of assessments for taxation in the town of Dunlap, the plaintiff's objections to the assessment to him for taxation for the year 1911, as moneys and credits, of a certain lease made by him to one Koll bearing date of October 10, 1908, were overruled. Plaintiff appealed to the district court, where his

objections were again overruled, and he now appeals to this court.—*Reversed.*

H. H. Roadifer, for appellant.

S. H. Cochran, for appellee.

McCLAIN, C. J.—In October, 1908, plaintiff, being the owner of a farm consisting of 280 acres in Monona county, executed with one Koll a written instrument purporting in the main to be a lease of the premises as farm property for a term of ten years, with privilege of extension of five years, at an annual rental of \$760, payable on the 1st day of March of each year, Koll as tenant, to pay taxes, keep the premises in repair, and keep the buildings insured. The instrument contained the other provisions of a farm lease with conditions of forfeiture, etc.; but it contained also the following provisions not appropriate to an ordinary lease:

The lessors agree to sell said premises to said Nick Koll, his heirs, executors or assigns for the sum of \$15,200, provided payment thereof is made on the first day of March of any year during the term of this lease. Payment of rent promptly on or before the day it becomes due is the essence of this contract. Upon the failure of the lessee to perform any act of this contract to pay the said rent or the taxes, or any condition therein agreed to be performed, this lease becomes canceled and of no effect, except for rent or taxes due, and the lessee's option of purchase stated above is lost. When the lease is canceled, lessor agrees to give to the lessee a good and sufficient warranty deed to said premises upon the payment of the said sum of \$15,200.00 (fifteen thousand two hundred dollars) as provided above. Abstract to be furnished, showing the title in the grantor.

It further appears that by agreement of the parties Koll paid \$3,000 in cash to the plaintiff when the lease was executed, and that this amount, added to the \$15,200 which Koll was to pay plaintiff on electing to purchase the property during

the continuance of the lease, made up the agreed purchase price of the property, and that the rent stipulated for was fixed on the basis of five per cent, on the deferred payment. It further appears from the testimony of Koll that it was understood between him and plaintiff that the only right he acquired with reference to the property was to occupy it as a tenant, unless he exercised his option as specified in the instrument, and that, if he allowed the lease to expire or be terminated without exercising such option, the \$3,000 paid in advance would be forfeited. There was no evidence that there was any agreement or understanding between the parties that Koll should have any other or greater rights in the property than those provided for in the instrument.

We reach the conclusion that the right which Koll acquired in addition to the other rights as tenant for the specified term was an option to buy the property on making an additional payment of \$15,200 without interest, the rental agreed upon being a substitute for interest, and that, on failing to make such payment within the time and in the manner specified in the lease, his option would fully and completely terminate, with the result that plaintiff had no right to compel the payment of the additional \$15,200 by Koll, and that Koll had no right to enforce any contract of purchase otherwise than by exercising the option provided for. Under this view of the relations of the parties, the contract between them was not a contract of purchase in such sense that it could properly be assessed to plaintiff as moneys and credits. *Schoonover v. Petcina*, 126 Iowa, 261; *In re Assessment of Shields*, 134 Iowa, 559.

Appellee relies upon circumstances as tending to show an intent on the part of plaintiff to conceal the real nature of the transaction and to evade taxation; but we find no circumstances which would justify us in holding that there was a binding contract between Koll and plaintiff for the unconditional purchase of the land. The advance payment of \$3,000 would, of course, strongly indicate that Koll intended to exer-

cise his option within the fifteen-years period provided for in the lease, and that he secured his option partly in consideration of such advance payment; but it does not follow that plaintiff could enforce the payment by Koll of the remainder of the purchase price. Other circumstances such as that Koll made some improvements by putting a new roof on the barn and building a cornerib out of old lumber on the place do not indicate that the contract was not what it purported to be. Koll was under obligation as tenant to keep the premises in repair, and, having a lease for a long term, might very well build a cornerib out of old lumber without indicating any other intention than that to which he testified, the intention to occupy as tenant and exercise his option if he saw fit to do so. The further circumstances disclosed in the record that plaintiff paid a real estate agent \$1 per acre for procuring Koll as a purchaser, and that Koll has since listed the farm for sale, are not in our judgment inconsistent with the conclusion that the written instrument expressed the real intent of the parties. Plaintiff may have been satisfied to pay a commission for procuring Koll as a prospective purchaser with whom such a contract was made, and Koll, having the option to take the title to the property at any time on paying the balance of the purchase price, may well have assumed that he could sell the farm at such advance in price as would justify him in exercising his option.

Counsel for appellee rely upon the evidence as establishing a fraudulent evasion of taxation. It is true that the terms of the contract are not conclusive, and that, if the real agreement was that Koll should be bound to pay in any event the balance of the purchase price, then plaintiff was assessable for the value of such contract as moneys and credits. *Meyer v. Dubuque County*, 49 Iowa, 193. But the fact that the plaintiff, desiring to avoid the obligation to pay taxes which would rest upon him if he made a binding contract of sale to Koll (notwithstanding the fact that the taxes on the land itself were to be paid by Koll under the terms of the lease), saw fit

to enter into a different kind of an arrangement, less favorable to him in some respects, which would not involve the payment of taxes on the balance of the purchase price until it was actually paid, would not constitute any fraudulent evasion of taxation. Persons have the right to invest their money in property or to otherwise contract with a view of not assuming the burdens of taxation if they see fit to do so, provided, of course, they act in good faith, and not with the intention of concealing or withholding from taxation that which is in fact or law subject to taxation. *Ottumwa Savings Bank v. City of Ottumwa*, 95 Iowa, 176. While double taxation effected by exacting a tax upon land and an independent tax upon a contract for the sale of the same land is not unconstitutional, on the other hand, we would not feel justified in branding as fraudulent a transaction made in good faith by which double taxation should be avoided.

The trial court therefore erred in holding that the contract evidenced by the written instrument conferring upon Koll an option to purchase on specified terms gave rise to a taxable credit in the hands of plaintiff; and the decision of the court is therefore—*Reversed*.

H. F. SCHULTZ, Plaintiff and Appellant, v. C. J. PARKER,
Sheriff, Appellee.

Legislative enactments: DEFINITION OF TERMS: FREE PASS. The legis-
1 lature has power to incorporate in an enactment itself a definition of some of the terms used therein, when within the fair range of definition. Thus in the statute prohibiting railway companies from giving free passes, it was competent for the legislature to define therein the term free pass, as any transportation for any other consideration than money at a rate open to all persons alike; as the same is in no sense expository legislation, or retrospective and *ex post facto*.

Same: It was proper for the legislature to declare by interpretation
2 of the term free pass, as used in the statute, that it was not so

used in its literal and absolute sense, but rather in a sense sufficiently broad as to give effectiveness to the legislation, by including within the prohibition the giving of transportation for an inadequate and discriminatory consideration, either in money or services.

Same: STATUTE: TITLE. A legislative act entitled "An Act to prohibit carriers of passengers from issuing, furnishing or giving free tickets, free passes, free transportation or discriminating reduced rates," except to certain described employees; to prohibit the acceptance or use thereof, except by such persons, and providing a penalty for a violation of the Act, was sufficient to indicate that the prohibition of the Act went beyond the free pass, in its technical meaning, and included any transportation issued for any discriminatory consideration.

Same: The title of a legislative Act is sufficient if it furnishes a key to the subject matter of the Act: So that the terms "free pass" and "discriminating reduced rate" are so closely related that when used in the title, either is sufficient to indicate a person who has purchased transportation at a nominal, or greatly disproportionate rate, where the consideration is indefinite or evasive.

Constitutional law: PROHIBITION OF FREE PASS: CLASS LEGISLATION.
The legislature has power under the constitution to deal with the pass evil, in the interest of the public welfare; and that power cannot be abridged by the fact that in its exercise the right of contract between an employer and employee may be incidentally interfered with: Nor will the fact that the law for that purpose exempts certain persons from its operation render it unconstitutional.

Same: APPEAL: REVIEWABLE QUESTIONS. In habeas corpus proceedings for the discharge of one arrested for violating the anti-pass law, tried upon an agreed statement of facts in which no question of burden of proof was raised, and defendant did not testify, the provisions of the law relating to privilege from testifying and exemption from prosecution were not involved, and therefore not reviewable on appeal.

Same: CONFLICT OF STATUTES. The Act of Congress prohibiting free transportation has relation to interstate transportation, while the state statute does not purport to apply to that subject and is therefore not void for conflict with the federal statute.

Same: STATUTE: PARTIAL INVALIDITY. Although the provisions of the state statute relating to testimony and the burden of proof were

unconstitutional, it would not invalidate the whole Act; as the same are not essential to the integrity of the Act as a whole.

Same: VALIDITY OF STATUTE. The anti-pass statute when fairly construed is not an interference with congressional jurisdiction over the subject of interstate commerce, and hence is not void on that ground.

Appeal from Sac District Court.—HON. Z. A. CHURCH, Judge

FRIDAY, DECEMBER 13, 1912.

THIS is a habeas corpus proceeding. The petition was filed and the writ obtained in October, 1907. It was brought against the defendant as sheriff, who held the plaintiff under arrest for violation of the provisions of chapter 112, Laws 32d General Assembly. The plaintiff challenged the validity of such legislative enactment, and therefore the validity of his arrest. Upon issues properly joined the trial was had. The trial court dismissed the petition, and the plaintiff has appealed.—*Affirmed.*

Kenyon, Kelleher & O'Connor and *B. I. Salinger*, for appellant.

H. W. Byers, Attorney General; *A. L. Whitney*, County Attorney, and *Chas. S. Wilcox*, for appellee.

EVANS, J.—The case was tried below upon an agreed statement of facts. The issues were so framed and the facts so stated as to enable the plaintiff to challenge the constitutionality of the anti-pass law, being chapter 112 of the Laws 32d General Assembly. This chapter now appears in the Code Supplement as sections 2157-f, 2157-g, 2157-h, 2157-i, and 2157-j.

For convenience of reference, we quote section 1 and a portion of section 2 thereof, as follows:

Section 1. No common carrier of passengers shall, directly or indirectly, issue, furnish or give any free ticket, free pass or free transportation for the carriage or passage of any person within this state except as permitted in the second section hereof. Nor shall any common carrier, in the sale of tickets for transportation at reduced rates, discriminate between persons purchasing the same, except the persons described in said sections. Nor shall any person accept or use any free ticket, free pass or free transportation except the persons described in said section. The words 'free ticket,' 'free pass,' 'free transportation' as used in this act shall include any ticket, pass, contract, permit or transportation issued, furnished or given to any person, by any common carrier of passengers, for carriage or passage for any other consideration than money paid in the usual way at the rate, fare or charge open to all who desire to purchase.

Sec. 2. The persons to whom free tickets, free passes, free transportation and discriminating reduced rates may be issued, furnished, or given are the following, to-wit: (a) the officers, agents, employees, attorneys, physicians, and surgeons, of such common carriers of passengers whose chief and principal occupation is to render service to common carriers of passengers.

This law went into effect on July 4, 1907. It is agreed that on July 9, 1907, the plaintiff received from the Illinois Central Railroad Company an annual pass good on all lines of the railroad within and without the state of Iowa. This pass was issued in pursuance of a contract entered into on the same date whereby the plaintiff as an attorney at law, residing at Storm Lake, Iowa, agreed to act as "local attorney" for such company, and to perform certain usual services for the railroad company pertaining to litigation then existing, or which might thereafter arise, in Buena Vista county. Such contemplated services were occasional and casual rather than usual or general, and might be much or little according to the contingencies of the future. The annual pass in question was to be received in full compensation for such prospective services. It is agreed, also, that the agreement for the services of plaintiff did not contemplate that he should become an attorney for the railroad company within the meaning of sec-

tion 2 of the act above set forth, and that the plaintiff was not within the excepted class therein specified. The plaintiff traveled upon said pass from point to point within the state of Iowa upon the lines of the railroad company upon business which was not in furtherance of any interest of the railroad company or in pursuance of its employment; and he paid no transportation therefor except the presentation of such pass.

In his petition for the writ, the plaintiff challenged the validity of the act referred to as being violative of the Constitution of the United States in the following respects:.

(1) The said act deprives the defendant of the right to make a contract in a lawful way, and for a lawful purpose. (2) It is class legislation, and not equal or uniform in its provisions. (3) It deprives the defendant of the equal protection of the laws. (4) It abridges the privileges and immunities of the defendant as a citizen of the United States. (5) It deprives the defendant of his property and liberty without due process of the law. (6) It is repugnant to and inconsistent with section 1 of the act of Congress to regulate commerce approved February 4, 1887, as amended by the act approved June 29, 1906. (7) It is repugnant to and inconsistent with section 22 of the act of Congress to regulate commerce, approved February 4, 1887, as amended March 2, 1889, and February 8, 1895, and as amended June 29, 1906. (8) It is repugnant to the fourteenth amendment to the Constitution of the United States. (9) It is repugnant to the fifth amendment to the Constitution of the United States. (10) It is repugnant to section 2. art. 4, of the Constitution of the United States. (11) It is repugnant to section 8 of article 1, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several states and with Indian tribes."

He also challenged the same as violative of the Constitution of Iowa in the following respects: (1) It deprives the defendant of the right to make a lawful contract in a lawful way for a lawful purpose. (2) It is class legislation, and not equal or uniform in its provisions. (3) It deprives the defend-

ant of the equal protection of the laws. (4) It abridges the privileges and immunities of the defendant as a citizen of the United States. (5) It deprives him of his property and liberty without due process of the law. (6) It is repugnant to section 1, art. 1, of the Bill of Rights as found in the Constitution of the state of Iowa. (7) It is repugnant to and in violation of section 6 of article 1 of the Constitution of the state of Iowa. (8) It is repugnant to and in violation of section 9 of article 1 of the Constitution of the state of Iowa. (9) The said act is in violation of and repugnant to section 29 of article 3 of the Constitution of the state of Iowa, which provides: Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title.

The plaintiff has filed here a brief presenting scores of points and hundreds of authorities. We shall not be able to consider them all in detail within the limits at our command. The brief, however, presents a succinct résumé of the substance of the points especially emphasized, and we avail ourselves of it as presenting his general line of argument as follows:

Part 1. There is a vital difference between a 'free pass' and one obtained for valuable consideration other than money. While the Iowa act directs the Iowa Legislature to ignore the distinction, it prohibits nothing but 'free' transportation; and Schulz has no such transportation. And by reason of this distinction the title of the act is fatally defective, because it advised that it is a prohibition of free passes, without indicating that the term is made to include such as are not free.

Part 2. A statute which, in effect, declares it to be a crime for a railroad carrier to pay wages except in money, or its employee to accept wages unless paid in money, which compels self-incrimination and puts the burden on the accused to prove himself innocent, and which makes criminality depend upon whether the pass holder has it for his main and chief occupation to give services to some common carrier or carriers of passengers, and which permits passes to some who are and some who are not employees of such corporations, though they do not meet such occupation test, is void for being in conflict with both the federal and state Constitutions, and with elementary natural justice, because (a) it denies

due process of law and the equal protection of the laws; (b) it does this by arbitrarily interfering with the right to make contracts; (c) by enacting arbitrary and oppressive class legislation; (d) by compelling the accused to incriminate himself, and especially by putting on him the burden of proving himself innocent, it takes from him elementary rights inherent in the social compact, in natural justice, trial in accord with common law, and rights that existed before the United States adopted a Constitution; (e) punishing one for disobeying a definition forced by the Legislature upon the courts is not due process because, in effect, it tries the accused before the Legislature without any of the sanctioned forms of procedure and without notice and hearing.

Part 3. At all events, this statute is an invasion of the province of Congress to regulate interstate commerce, because, Congress having declared what passes such common carriers may issue, the state may neither conflict with nor complement that declaration.

Part 4. The unconstitutional parts so manifestly induced the passage of the act that it is void *in toto*.

I. It is the first contention of plaintiff in argument that his pass was not a "free pass;" that the prohibition of the statute applies only to a "free pass," and not to a pass supported by any consideration. He argues, therefore, that his use of the pass in the manner heretofore indicated was not a violation of the statute. He urges that the last sentence of section 1 which purports to define "free pass" is "expository," and therefore ineffective, and that the court must construe the enactment without reference to such expository declaration. Putting the proposition in this way, no constitutional question is raised, and the plaintiff is therefore quite outside the record made in the trial court. Passing this, however, it is argued that the Legislature had no power to put a construction upon the terms used in the enactment, and that such attempted construction was an encroachment upon the power of the court. Expository legislation as the term has usually been applied has reference to those acts of Legislatures which purport to put a construction upon past

1. LEGISLATIVE
ENACTMENTS:
definition of
terms: free
pass.

enactments without making any amendments thereto. Such legislation has been quite uniformly condemned. *Richardson v. Fitzgerald*, 132 Iowa, 255. If such legislation were sustained, its effect would necessarily be retrospective and *ex post facto*. The act before us is not one of that kind. We have here an attempt of the Legislature to incorporate in the enactment itself a definition of some of the terms used therein. That this may be done within the fair range of definition is well settled, and the appellant does not claim otherwise. *State v. Schlenker*, 112 Iowa, 642; *Jones v. Surprise*, 64 N. H. 243 (9 Atl. 384); Endlich on Interpretation of Statutes, section 365; Sutherland on Statutory Construction, section 402. In *Richardson v. Fitzgerald*, 132 Iowa, 255, an act was under consideration relating to a past enactment. It was capable of being construed as expository legislation. This court, however, construed it as amendatory of such past enactment. The plaintiff recognizes that this case, if followed, is fatal to his contentions at this point, and asks that it be overruled. The case goes further, doubtless, than many of the previous authorities. But the holding is nevertheless a very rational one. It serves to give effect to the manifest intention of the Legislature, even though such intent was badly expressed. A contrary holding would have been consistent with respectable authorities. We are impressed, however, that some of such authorities indulge in undue *finesse* at this point.

If acts of the Legislature are to be overturned or ignored by the judiciary as unconstitutional, it should be for substance of reason, and not for nicety of distinction in the use of terms.

It is further argued at this point that a "free pass" is a free pass, and that it is incapable of any other definition. The authorities cited by the appellant are not quite agreed as to what constitutes a free pass. In *State v. Martyn*, 82 Neb. 225 (117 N. W. 719, 23 L. R. A. (N. S.) 217, 17 Ann. Cas. 659), it was held that, where the services of a surgeon were rendered for \$25 a month and

2. SAME.

an annual pass, the provision for the pass was a mere evasion of the statute, and was a gratuity within the meaning of the statute. If one were to pay \$1 for an annual pass over the line of a great railway system, it would not be a free pass in a literal sense as contended for by plaintiff. But a court might well construe it as such as being within the spirit of the statute; otherwise the statute would fall by the mere weight of its own words. It could be evaded with impunity in numberless ways, whereby its letter could be obeyed and its spirit violated. If for the nominal consideration of \$1 we should substitute the substantial consideration of \$100, the problem would still remain. Such a substantial consideration would conform to the letter of the act with less appearance of evasion, but it would still leave the act ineffective for want of compliance with its manifest spirit. This is perhaps a sufficient illustration to show the reasonableness of applying legislative interpretation to the terms used in the act. By this interpretation it was announced that the word "free" was not used in a literal and absolute sense, but that it was used in a sense sufficiently broad to give effectiveness to the legislation. If the spirit of the statute could be deemed broader than its literal terms, used in a strictly technical sense, then it was appropriate by definition to broaden the literal term to the larger dimension. And that is all that we have here. The purpose and effect of the definition is to make known by appropriate expression the scope of the statute both in letter and spirit, and to render coincident such letter and spirit. Otherwise the law is slain by its own letter, and furnishes an apt illustration of the Scripture saying: "The letter killeth but the spirit giveth life." 2 Cor. iii, 6. An exhaustive citation and review of authorities may be found in a note to *State v. Martyn*, 82 Neb. 225 (117 N. W. 719, 23 L. R. A. [N. S.] 217, 17 Ann. Cas. 659).

II. It is urged that the title of the act in question did not comply with the requirements of section 29 of article 3

of the Constitution of Iowa, viz., "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The title of the act is as follows: "An act to prohibit common carriers of passengers from issuing, furnishing or giving free tickets, free passes, free transportation or discriminating reduced rates, except to certain described persons: to prohibit the acceptance or use of such free tickets, free passes, free transportation or discriminating reduced rates by any except certain described persons; providing a penalty for the violation of the act, also for annual reports and for the repeal of chapter ninety (90), Laws of the Thirty-First General Assembly." The argument of appellant is that there is nothing in the title of the act to indicate that the prohibitions of the act went beyond the "free pass," or that passes paid for by services were included therein. If we are correct in our analysis of the statute in the preceding division hereof, then it quite disposes of appellant's contention at this point also. The title indicates the prohibition of "free transportation" and "discriminating reduced rates." The act responds to the "subject" announced in the title "and matters properly connected therewith." Appellant argues that he has neither a free pass nor a discriminating rate, and that his case is therefore not covered by the title. Assuming that by his promise to serve the railroad company he gave a valuable consideration for the pass in question, it yet remained that the extent of transportation or mileage which he could receive under his pass need bear no proportion to the amount of services which he might render. The extent of his transportation was not limited by the extent of his services. If one must pay a fixed mileage rate for all transportation, and another is permitted to purchase transportation to an unlimited extent without any reference to rate, for the mere promise of a limited and indefinite service, it is a tender characterization to call it "discrimination." The

act does prohibit "discriminating reduced rates," and the title does so indicate.

But the appellant argues that by the last sentence of section 1 of the act a pass furnished for any other consideration than money was defined to be a "free pass," and that the title of the act gave no notice of such definition.

He argues, also, that, even though his pass might by judicial interpretation be properly declared a discrimination, yet the act has defined it otherwise and as a free pass. A "free

pass" and a "discriminating reduced rate" are not so far apart or so distinct in their essential nature as appellant's argument places them. Indeed, they are so close together and occupy so much common ground that they often present no line of demarcation. One is a form of the other. If one patron purchase 1,000 miles of transportation for \$20, and another patron purchase 2,000 miles for \$20, we have a concrete case. Analyzing it, we may say that the second patron purchased his transportation at half rates. That would be a "discriminating reduced rate." Or we may say that the second patron paid the regular rate for 1,000 miles, and paid nothing for the other thousand, that would be "free transportation." Such a concrete case doubtless would be more naturally classified as discrimination rather than free transportation. But when the consideration paid is nominal or greatly disproportionate, or is indefinite or evasive, then such a concrete case may well be claimed by either class. We have frequently held that the title of an act, though confined to general terms, is sufficient if it answers as a key to the subject matter of the act. *Sisson v. Board of Supervisors*, 128 Iowa, 442; *Hubbell v. Higgins*, 148 Iowa, 36; *State v. Fairmont Creamery Co.*, 153 Iowa 702; *Bereshein v. Arnd*, 117 Iowa, 83; *Cook v. Marshall County*, 119 Iowa, 384. To the same effect, *Lynch v. Chase*, 55 Kan. 367 (40 Pac. 666); *Nebraska Loan Company v. Perkins*, 61 Neb. 254 (85 N. W. 67); *Johnson v. Harrison*, 47 Minn. 575 (50 N. W. 923, 28 Am.

St. Rep. 382). The subject is so fully discussed in our decisions above cited that we will not repeat the discussion here.

III. It is urged that the act complained of is an interference with the liberty of contract as between employer and employee and that it is therefore class legislation. It is also

5. CONSTITU-
TIONAL LAW :
prohibition of
free pass :
class legis-
lation.

urged that section 2 of the act which excepts certain classes from its operation is arbitrary and unreasonable and therefore discriminatory. If the main purpose and scope of the act in question were to set a limitation upon the liberty of contract as between employer and employee or as between railway corporations as particular employers and their employees, appellant's arguments at this point would have more application to the case.

The real question at this point is whether the Legislature has adequate power in a constitutional sense to deal with the pass evil. That it was an evil of great magnitude none will deny. It permeated the departments of government. It threatened the purity of legislation and the integrity of administration. It was growing with acceleration. Even those who had nurtured it, and those who fed upon it, were suing, helpless, for release. Such being the evil universally recognized, was the Legislature constitutionally helpless to deal with it? We cannot think so. We think the Legislature had power under the Constitution to enact adequate legislation for the general public welfare on this subject. The liberties abridged and the classifications adopted and now complained of were purely incidental to such exercise of power. The exercise of the power was clearly reasonable, and the abridgment of private rights was manifestly unavoidable, and no ground of complaint is available to the appellant at this point. This question, including the question of classification, is fully discussed in our previous cases above cited; the latest cases being *Hubbell v. Higgins, supra*, and *State v. Fairmont Creamery Co., supra*. No useful purpose can be served by repeating the discussion contained in such previous cases,

and it will be adopted here by this reference. To the same effect is *Louisville & N. Ky. Co. v. Mottley*, 219 U. S. 467 (31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. [N. S.] 671).

IV. The appellant complains of section 3 of the act which is as follows: "No person within the purview of this act shall be privileged from testifying in relation to anything herein prohibited, but no person having testified shall be liable to any prosecution or punishment for any offense concerning which he was required to give his testimony." The complaint is made on the ground that it compels a defendant to become a witness against himself. Further complaint is made of a portion of the act, in that it lays a certain burden of proof upon the defendant. These points are argued extensively. They are not fairly involved in this case. We will not go beyond the facts of the case in search of constitutional questions. This case was tried upon an agreed statement of facts. No question of burden of proof appears. Nor did appellant testify in the case.

It is also argued that the act in question was an interference with an act of Congress upon the same subject. The act of Congress known as the Hepburn Act (Act June 29, 1906, case 3591, (34 Stat. 584, U. S. Comp. St. Supp. 1911, p. 1284) forbids common carriers engaged in interstate commerce to issue directly or indirectly any interstate free pass, except to its attorneys, etc. The act of Congress only purports to apply to interstate transportation. Our legislative act does not in terms purport to deal with interstate transportation. The information under which the appellant is prosecuted charged him with using his pass only between points within the state of Iowa. It appears from the agreed statement of facts that he did so use it. It is true that it also appears from such agreed statement that the appellant used his pass between a point in the state of Iowa and the city of Chicago, but such fact adds nothing to the case. No charge of violation of the law is based

6. SAME: appeal:
reviewable
questions.

7. SAME: conflict
of statutes.

upon it in the information. We think, therefore, that no question of conflict of jurisdiction is presented.

Assuming, however, that the questions here considered are not directly involved in this prosecution, appellant urges that these questions do go nevertheless to the integrity of the statute as a whole. It is argued that, if any one of these provisions should be held invalid, it would carry down with it the entire act.

8. SAME: statutes: partial invalidity.

As to the provisions concerning testimony and the burden of proof, it seems quite clear that these are not essential to the integrity of the act as a whole, and that, if they were eliminated by judicial condemnation, the act in other respects would not be affected. *Hubbell v. Higgins, supra*.

As to the alleged interference with the jurisdiction of Congress, this question does not arise naturally upon the face of the act as written. At this point appellant first contends for a particular construction of the act, and then contends that the act as so construed is void *in toto* as an interference with the jurisdiction of Congress. Construing the act for the purpose of attack, appellant says that it is sufficiently comprehensive in its terms as to be applicable to all commerce, including interstate commerce. Granting the possibility of such construction as a matter of verbal emphasis, is it the necessary construction? Is it the natural and reasonable construction? If the act is so written that it must be so construed, then it may be conceded that it is wholly invalid. But we are clear that the construction thus contended for is not the fair and natural construction of the act. Only a searching eye and an ingenious argument could bring it to the surface. The rule is well settled that legislative acts will not be nullified by mere construction. If the act will fairly bear a construction which will save its validity, a construction will not be adopted which will destroy it. We think the act in question is not amenable to the attack upon it at this point.

9. SAME: validity of statute.

The foregoing points considered comprise the principal

lines of attack made upon the validity of the act. They are dealt with in the argument under many subdivisions, and their many-sided phases are discussed under many points. The argument is instructive and interesting, but we cannot follow it into further detail.

If it were legally necessary to sustain its contentions, little, if any, legislation could ever clear the hurdles thus set up.

The petition for the writ was properly dismissed, and the judgment below is accordingly *Affirmed*.

JOHN KELLY and PATRICK KELLY, Appellants, v. JAMES
KELLY and THOMAS F. KELLY, Appellees.

Wills: PROBATE: EFFECT: ACTION TO SET WILL ASIDE. The admission of a will to probate without contest is a preliminary order which affects a *prima facie* establishment of the instrument, but does not cut off the right to contest its validity by an original action brought within the statutory five year period.

Appeal from Iowa District Court.—HON. R. P. HOWELL,
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION to set aside a will. Demurrer to the petition sustained, and plaintiffs appeal.—*Reversed*.

W. J. Baldwin and J. M. Dower, for appellants.

Yoss & Wallace and Popham & Havner, for appellees.

WEAVER, J.—Margaret Kelly died testate October 31, 1910. She was unmarried and childless. Her only surviving heirs were her four brothers, James, Thomas F., John and

Patrick. By the terms of her will she gave the bulk of her property to James and Thomas F., making no mention of either John or Patrick. The instrument having been filed for probate, due notice of the proceeding was personally served in this state upon all the heirs, including John and Patrick. No objections were filed by any of the heirs, and upon the usual proof of its due execution the will was admitted to probate at the January, 1911, term of the district court of Iowa county. On November 18, 1911, John Kelly and Patrick Kelly instituted this action to set aside the will and the probate thereof on the ground that the testatrix was at the date of said instrument of unsound mind and incapable of making a valid testamentary disposition of her estate, and that the execution of the alleged will was obtained by undue influence. To the petition alleging the foregoing state of facts the defendants demurred on the following grounds: (1) A defect of parties in that the petition fails to make the executor of the will a defendant in the action; and (2) the petition shows upon its face that the plaintiffs were made parties to the probate proceedings and personally served with notice thereof, but failed to appear thereto or to contest the same in any manner whereby they became and are estoppel to deny the validity of the will or the sufficiency of the adjudication upon which it was admitted to probate. The demurrer was held by the trial court to be well taken, and plaintiffs electing to stand upon their petition without further amendment, the action was dismissed at their costs. From this judgment plaintiffs appeal.

Stated briefly, the question thus presented is whether appellants, as heirs of the deceased, after being notified of the proceedings and allowing the will to be probated without objection, may maintain an original action to set aside the probate and contest the validity of such will. The trial court answered this question in the negative, and we are asked to review the record and reverse such decision.

The right to maintain such action must be found, if at all, in the statute. So far as they have immediate bearing upon

the question, our statutory provisions are as follows: (1) Any person of full age and sound mind may dispose of all his property by will subject only to the rights of his creditors and of his surviving spouse if any. Code, section 3270. (2) The will must be in writing and duly witnessed. Code, section 3274. (3) The will must be filed in the proper court and a day fixed for the hearing at which any party in interest may appear and contest the probate. Issues so joined are triable to a jury. Code, section 3283. (4) The clerk must give due notice by publication of the time and place of such hearing unless a different notice is prescribed by the court. Code, section 3284. (5) The admission to probate when duly certified renders the will competent evidence in all courts without further proof. Code, section 3286. (6) Such probate is conclusive proof of the due execution of the will *until set aside by an original or appellate proceeding*. Code, section 3296. (7) *Action to set aside a will may be brought within five years from the date when the instrument "is filed in the clerk's office and notice thereof is given."* Code, section 3447.

Were the question one of first impression the writer of this opinion would strongly incline to the view upheld by the trial court, and say that the right to maintain an original action to set aside a will after due probate thereof is not available to a party in interest who had due notice of the proceedings and failed to appear or object thereto. To hold otherwise is to complicate the settlement of every estate where a testator has seen fit to exclude an heir from sharing in his bounty and cloud the title to all property so devised by the possibility of a successful contest being instituted at any time during a period of five years. Nor does it seem to the writer that the language of the statute necessarily demands such a construction, but the opposite view seems to have had judicial sanction too long to be unsettled except by legislative intervention. The provision which makes the probate of a will conclusive until set aside by an original or appellate proceeding has been a feature of the statute since early in the history of the state. Code of

1851, section 1297; Revision of 1860, section 2329; Code of 1873, section 2353; Code of 1897, section 3296. It has been quite uniformly interpreted as making the validity of a will the subject of investigation in an original action by a party in interest at any time within five years from the filing of such will for probate and the giving of notice thereof. In accordance with that theory, it has been held that: "Rights of a party claiming a distributive share in his ancestor's estate are not concluded by the order of the court admitting the will to probate. Such party may still, by proper proceedings, have the question, of his right to a portion of his ancestor's estate, determined. The admission of the will decides no question but its due execution and publication." *Lorieux v. Keller*, 5 Iowa, 201. In *Havelick v. Havelick*, 18 Iowa, 415, the plaintiff brought action to set aside a will which had been admitted to probate, and the court, after quoting the statute last above cited, says: "The petitioners were therefore not confined to their appellate remedy after the allowance of the will by the county court, but could properly commence this their original action to set the same aside." After the transfer of probate jurisdiction from the county court to the circuit court, question was raised involving this statute, and the court said: "It is plain that the effect of the probate of a will in the circuit court is the same as was the effect of a like proceeding under the former practice in the county court. Such a construction works no prejudice to those interested adversely to the will, as it is competent for them, notwithstanding the probate of the will, to institute a direct proceeding to set it aside." *Gilruth v. Gilruth*, 40 Iowa, 348. In *Kelsey v. Kelsey*, 57 Iowa, 383, the executor of a will which had been duly probated brought an action to construe some of its provisions. To this an heir of the testator appeared and by cross-bill asked to have the will declared void. It was held that this was equivalent to a direct attack upon the will in an original proceeding and as such could properly be maintained. The rule of the *Havelick* case was also affirmed in *Leighton v. Orr*, 44

Iowa, 683. In *Kirsher v. Kirsher*, 120 Iowa, 345, one of the parties urged the proposition that, when a will has once been duly admitted to probate, the order can only be set aside in an equitable action. To this the court in its opinion responds, saying: "The exact reverse of this contention was held in *Leighton v. Orr*, 44 Iowa, 679, and it has been the practice in this state for more than a quarter of a century; and, even if there were no judicial construction of the statute, we would hesitate long before departing from so venerable a rule."

This is not an exhaustive citation of our precedents upon the point under discussion, but they are sufficient to show their tenor and effect. The only exception to this rule is found in *Gregg v. Myatt*, 78 Iowa, 703, where the court, speaking by Beck, J., seem to distinctly hold that admission of a will to probate is final and conclusive as to all parties in interest personally served with notice thereof, and that the provision allowing subsequent original proceedings to set aside the will is for the benefit of those not served with notice or upon whom only constructive service has been had. While this decision has never been expressly overruled, it appears never to have been followed upon this point, and the distinction which it makes has nowhere else been recognized. Certain it is the statute does not in terms declare such distinction. Indeed, the statute provides for no notice other than by publication, though it recognizes the authority of the court by proper order to designate some other method of service. This fact gives color to the theory that the Legislature did not intend to give an order of admission to probate the conclusive effect of a final judgment in an ordinary adversary proceeding. The preservation of the estate and the protection of the interests of all concerned are ordinarily promoted by an early probate of the will and the appointment of an executor authorized to take charge of the property. This is accomplished by the simple and somewhat informal proceedings we have described; but, as construed by the court, the statute at the same time keeps the door of the court open for those who are aggrieved by the

terms of the will to sue for its cancellation until the statute of limitations erects a bar to such relief.

The rule thus approved is also applied in other jurisdictions. Thus it has been said by the Illinois court that the original probate of a will "is not designed as a final and conclusive determination of the testamentary capacity of the testator upon all the evidence that may be produced. The purpose is only to establish testamentary capacity *prima facie* in order that the will may be recorded, the estate cared for, and administration proceed." *O'Brien v. Bonfield*, 213 Ill. 428, (72 N. E. 1090); *Shaw v. Moderwell*, 104 Ill. 64; *Tate v. Tate*, 89 Ill. 42; *Knox v. Paull*, 95 Ala. 505, (11 South. 156); *Dillard v. Dillard*, 78 Va. 208. It has also been said that probate of a will is an incipient step to give jurisdiction, and the court may thereafter entertain a proceeding to set it aside. *Wall v. Wall*, 30 Miss. 91, (64 Am. Dec. 147).

In short, the accepted doctrine in jurisdictions having statutes similar to our own appears to be that admission of a will to probate originally without contest is a preliminary order or judgment which effects a *prima facie* establishment of the instrument, and gives the court and executor authority to proceed with the administration and settlement of the estate, but does not operate to cut off the right of contest in an original action within the statutory period of limitation. This court is, as we have already seen, committed to that construction of the statute, and, adhering to that rule, it follows that the judgment appealed from must be reversed. In so far as the decision in *Gregg v. Myatt*, *supra*, is inconsistent with this holding, it must be considered overruled.—*Reversed*.

CARRIE SCHLADER, et al., Appellees, v. GEORGE R. STREVER,
Appellant.

Drainage of surface water: EASEMENT: EVIDENCE: ESTOPPEL. Where
1 one landowner constructed a drain through the land of another in

pursuance of an agreement and in reliance thereon as affording an outlet for his surface water, and incurred expense in constructing the same and making his connection therewith, the grantees of the servient estate are bound thereby, and are estopped to obstruct the drain or deprive the owner of its beneficial use. The evidence in this action is held to show an agreement of defendants grantor with plaintiffs ancestor for the construction of the drain over the land of defendant.

Same: NATURAL DRAINAGE: OBSTRUCTION. A landowner may drain
2 the surface water along a natural waterway, and an adjoining owner cannot rightfully obstruct the flow and turn the water back upon his land.

Same: INCREASED FLOW. Where a landowner has acquired an outlet
3 for the drainage of his surface water through the land of another, he may by extending the lines of tile drain the low wet places in his land into the same, in accordance with the usages of good husbandry; not however diverting the water naturally tributary to another course of drainage in quantities injurious to the servient estate.

Same: RIGHT TO DRAIN OVER OTHER LAND: DAMAGES. Under the stat-
4 ute a landowner may lawfully drain his land into a natural water course, or depression on his own land which leads into a natural watercourse, without liability in damages to anyone; and where the natural drainage is not wholly upon his own land, but is carried to adjoining land in accordance with an agreement with the owner, the same immunity from damages exists.

Appeal from Wright District Court.—HON. CHAS. E. ALBROOK,
Judge.

FRIDAY, DECEMBER 13, 1912.

THE opinion states the nature of the case and the material facts.—*Affirmed.*

D. C. Chase and W. J. Coril, for appellant.

Sylvester Flynn, for appellees.

WEAVER, J.—The plaintiffs are the heirs of George Schlader, deceased, from whom they derived title to the N. W.

$\frac{1}{4}$ of section 16, township 90, range 25 in Wright county, Iowa. The deceased obtained his title in the year 1890. A swale or natural course of drainage crosses this land from the northwest to the southeast, and extends for a considerable distance upon the east half of said section, and discharges into what is known as the White Fox creek. At the time in question the land was owned by one Walter Good, through whom title thereto is traced to the defendant in this action. Prior to 1894 an open ditch had been constructed along the course of the swale across both tracts of land affording both some degree of drainage. In 1894 or 1895 Schlader laid a twelve-inch tile drain along the course of the open ditch across his land, and under an agreement with Good, to which a reference will later be made, he extended the same a distance of sixty rods along the same open ditch in the direction of the creek. Having laid the tile, he filled the excavation upon his own land, but left that part on the land of Good unfilled. A year or two later Good took up that portion of the uncovered tile which had become broken, replaced them with new tile, cleaned out those which had become more or less obstructed, and refilled the ditch. He also extended said tile drain from the point where it was left by Schlader to the creek, or at least entirely across his own land. Both Schlader and Good and his grantees constructed laterals on their respective premises discharging into the main tile. The system thus provided afforded sufficient drainage, so that both tracts of land have to a considerable extent been cultivated and used for ordinary farming purposes in and along the course of the swale, though it is claimed by the defendant that the twelve-inch tile is insufficient to carry off all the water in wet seasons, and that his crops are thereby at times injured or destroyed. The drainage system constructed, as stated, seems to have been used by both parties without controversy or objection on either side until after defendant herein purchased the east half of the section in the year 1909. He made the purchase, knowing the existence of the drain, and required his grantor to covenant or contract

against the legal right in any other person to any easement or interest of that nature. In the year 1910 defendant closed or obstructed the main tile near the point of its entrance from the plaintiff's land, and, when such obstruction was removed, he renewed it. Thereupon this action was begun to enjoin further interference with or obstruction of said drainage, and for the recovery of damages. It is the claim of plaintiffs that they have a legal right under the statutes and laws of this state to the unobstructed flow of drainage from their land along the said ditch as a natural water way. They also claim that said tile drain was constructed under an oral agreement with Good, the defendant's grantor, whereby a perpetual license or easement was created for the construction and maintenance of said drain for the benefit of the land now owned by them. The defendants deny the existence of any such right, and deny that any agreement was ever made between Good and Schlader, whereby the latter obtained anything more than a mere temporary license to maintain such drain. They also allege that plaintiff has brought to such drain surface waters from outside the natural watershed, thereby unduly increasing the burden upon the servient estate. The trial court found for the plaintiff, and granted the relief prayed. The defendant appeals.

Concerning the agreement under which Schlader extended his tile sixty rods down the swale upon the land of Good, there

1. DRAINAGE
OF SURFACE
WATER: ease-
ment: evi-
dence: estop-
pel.

is some conflict of evidence, but, upon careful examination, it is apparent that the dispute relates to incidental matters, and not to the real essence of the contract. It is not denied

that, when Schlader undertook the drainage of his land, he sought his adjoining owner Good, or rather Good's brother and agent in possession of the land, and that the latter reported the same to the owner. The negotiations according to defendant's own showing resulted in an agreement that Schlader should be allowed to extend the drain along the open

ditch for a distance of sixty rods upon Good's land, and that Good should pay for such improvement or contribute thereto to the extent of \$100, the tile, so laid upon the premises of the latter, to thereafter belong to him. Plaintiff's evidence tends to show a similar agreement except as to where the ownership of the tile in the drain on Good's land should rest. Defendant's evidence further tends to show that while Schlader dug the ditch, and laid the tile on the land of Good for the distance contemplated, he did not cover or fill the excavation. Good complained of this omission, and objected to making the payment of \$100, and the parties compromised, upon the sum of \$25, which was thereupon paid to Schlader. Good then or later took up and cleaned a part of the tile, renewed the broken ones, and filled the excavation, leaving the drainage from Schlader's land through such tile unobstructed. It is true Good as a witness now swears that he never agreed to give Schlader any right to an outlet for drainage upon his land, and that the sum and substance was that he employed and paid Schlader to construct this sixty rods of drain for the benefit of his (Good's) land.

This statement evidently lacks candor, or the witness is confused as to the very manifest meaning of his own words. There is no pretense or shadow of evidence in the record that Schlader sought the job of making this drain as a mere employe or contractor without respect to its effect upon his own land. Or the contrary, it is perfectly clear that in these negotiations he was seeking to secure or improve an outlet for his drain. Good himself on cross-examination says: "The first I knew of Schlader constructing a drain through the N. W. $\frac{1}{4}$ of section 16 was when my brother wrote me about it eleven or twelve years ago. In his letter he told me that Schlader was either tiling or had tiled his land, and wanted to come over and get an outlet upon my land. . . . I never knew of anything that my brother said to me that Schlader wanted to do anything further for me than to place the tile on my land

and get an outlet for himself.' It was unquestionably for this purpose and for this purpose alone that Schlader sought the arrangement permitting him to construct this drain, and it is incredible that the parties thereto did not both know and understand that he was thereby to acquire the right to use said drain as an outlet. If he, in fact, did not complete the work in the manner contemplated, that failure on his part was condoned, and the damage resulting therefrom was paid in the settlement by which Good was relieved from his payment of a part of his promised contribution to the expense. That such was the understanding of the parties was shown by the fact that, after Good had repaired such drain, he restored the connection with plaintiff's tile, and it continued to do service as an outlet for plaintiff's drainage for twelve years or more without any objection or complaint from Good or his grantees. The fact, if it be a fact, that it was understood that the tile laid upon Good's land should become his property, is in no manner inconsistent with plaintiff's claim that Schlader had Good's agreement to afford him an outlet for his drain.

That agreement having been acted upon, and Schlader having adjusted his drainage system in reliance upon such outlet and incurred the expense of constructing the same and making connection therewith, defendant cannot rightfully obstruct such outlet, or deprive the plaintiffs of the beneficial use thereof. *Vannest v. Fleming*, 79 Iowa, 638; *Neuhring v. Schmidt*, 130 Iowa, 401; *Brown v. Honeyfield*, 139 Iowa, 414; *Hansen v. Creamery Co.*, 106 Iowa, 167.

Moreover, the drainage in question is along a natural waterway, and defendant cannot rightfully obstruct the flow and set the water back upon the land of the plaintiffs. The open ditch in which the tile was laid had existed from some more remote date, and afforded an outlet or means of escape for the drainage of both farms. Defendant has both filled this ditch and stopped the tile, thereby wholly preventing the flow from the dominant estate, except as the obstructed waters may arise

2. SAME: natural drainage: obstruction.

and overspread the surface. There is no sound theory of law on which such action can be justified.

It is claimed, however, that by means of their lateral ditches plaintiffs have diverted to the main tile waters not

3. SAME: in- naturally flowing in that direction to an
creased flow. amount which lessens the effectiveness of

defendant's drainage of his premises. There is some testimony of this character, but we think it fails to show any material or wrongful increase of the burden upon defendant's lands. It may be true that within the watershed served by the drain in controversy there were some low spots of restricted area in which surface waters would stand at times, and only the overflow and seepage be discharged into the swale, and that by extending the lines of tile through these wet places they were drained to the bottom, and converted into arable land, but we think this is not only in accordance with the usages of good husbandry, but is well within the right of the dominant owner. That any material amount of surface water naturally tributary to some other line or course of drainage has been diverted to the outlet here in dispute is not in our judgment shown by the record. Whether the statute hereinafter cited has any effect to abrogate or modify the unwritten law in this respect we shall not here attempt to decide. None of the cases cited by appellant require any other conclusion than we have already indicated. Both statute and case law on the subject of drainage of rural lands in this state are to a considerable extent the product of a comparatively recent evolution the completion or perfection of which is probably not yet in sight. The distinct tendency on the part of both Legislature and courts has been and still is toward an enactment and interpretation of law, which, while depriving no person of essential or valuable rights, shall not allow any reasonable effort for reclamation, improvement, and development of agricultural lands to be thwarted because of objections which are at best technical and unsubstantial.

Among the evidence of this tendency prominence is to be

given the recent statute, Code Supp. section 1989-a53, which provides that owners of land may drain the same by the construction of open or covered drains discharging the same into any natural water course or into any natural depression whereby the water will be carried into some natural water course, and, when such drainage is wholly upon the owner's land, he shall not be liable in damages to any person. It follows, of course, that where such drainage is not wholly upon the owner's land, but is carried into or discharged upon the land of an adjoining owner with the agreement of the latter, a like immunity from liability for damages must also exist. The statute has served to relieve the situation from the hampering effect of a too literal reading and application of certain abstract statements of law contained in the discussion of precedents and principles found in *Livingston v. McDonald*, 21 Iowa 160, and some other cases in which that decision has been followed and approved. The statutory right of the plaintiffs to collect the surface waters upon their premises into a single ditch discharging into a natural water course or depression leading into such a water course is thereby assured and this being supplemented by the acquired right to extend the outlet along such course into the land of the defendant the court will protect him in its use and prohibit its obstruction by the defendant. The decree of the district court is right, and it must be approved.

A motion has been filed by appellant to tax appellees with the cost of printing the amended abstract in this case. The amendment contains fifty-two pages of printed matter, and exceeds in volume the original abstract. We think it much more voluminous than necessary to a proper presentation of the record and the cost of such printing in excess of fifteen pages will be taxed to the appellees. All other costs will be taxed to the appellant.—*Affirmed*.

JOHN D. KERR and SADIE KERR, Appellants, v. CHRIS YAGER, ANNIE YAGER, ELLA SAPP NORMAN, GEO. NORMAN, NETTIE SAPP MILLSPAUGH, ANNA SAPP CLEVELAND, JAMES CLEVELAND, DAISY SAPP ALDRICH, C. LESTER ALDRICH and MARY SAPP, Appellees.

Partition: ADVERSE POSSESSION: BURDEN OF PROOF: EVIDENCE. The
1 defendant in partition proceedings, who claims the land by virtue of an oral transfer followed by possession for the statutory period, has the burden of proof on that issue. In the instant case the evidence is held to show that a parol conveyance was made to defendants' grantor, in consideration for past services and an agreement to pay the taxes on the land.

Evidence: CONFIDENTIAL COMMUNICATIONS. The grantor of a party to
2 an action involving real estate is incompetent under the statute to testify to personal transactions or communications with his deceased father, from whom he claimed an oral conveyance of the land; but the wife and son of the grantor are competent witnesses to communications between the husband and father, and his deceased grantor, for the purpose of establishing a parol conveyance, and in an action to which they were not parties.

Same: WAIVER OF OBJECTIONS. An objection to evidence on specified
3 grounds waives all other grounds of objection.

Conveyances: STATUTE OF FRAUDS: CONSIDERATION. The satisfaction
4 of a pre-existing debt is a sufficient consideration for the conveyance of land, and amounts to such payment as to take the transaction out of the statute of frauds.

Appeal: ABSTRACT: TIME. Where appellees' amended abstract was
5 filed as soon as the points for reversal relied upon by appellant were known, though not in time, it will not be stricken.

Appeal from Harrison District Court.—HON. A. B. THORNELL,
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION for the partition of certain real estate. Defendants Yager and Yager claimed to be the owners of the land through *mesne* conveyances from James H. House, now deceased, from whom all parties trace their title. Various other issues were tendered, and upon trial to the court a decree was rendered dismissing plaintiff's petition, and quieting the title to the land in defendants Yager and Yager. Plaintiff's appeal.—*Affirmed*.

J. S. Dewell, for appellants.

C. W. Kellogg, for appellees Yager and Yager.

Clem F. Kimball, for other appellees.

DEEMER, J.—James H. House died some time in the year 1888, seised of the record title to the land in controversy. He had five children, to wit: William, Chas., and Allen, sons, and Jannet, who afterwards married William Eddie, and Eliza, who afterwards married Abraham Sapp, daughters. Prior to the death of James, Jannet Eddie died, leaving three children, Chas., Winnie, who married plaintiff John D. Kerr, and Lillie, who afterwards married John Brownrigg. Winnie Kerr died prior to the demise of James House, leaving one daughter, Sadie Kerr, a minor, who is also one of the plaintiff's, and the two plaintiffs claim to own an undivided one-fifteenth of the real estate. Eliza Sapp died before the death of her father, leaving six children surviving, and these, with their respective husbands and wives, are defendants, and they each claim a one-thirtieth interest in the real estate. William, Charles, and James House, sons, quitclaimed their interest in their father's property to the other son, Allen, and thereby Allen became vested of an undivided three-fifths of said real estate. And on July 27, 1904, Allen House, his wife joining,

conveyed their interest to defendants Yager and Yager. In October of the year 1906 Chas. Eddie and wife and Lillie Brownrigg and husband conveyed their interest in the land to plaintiff Kerr, and it is claimed that he thereby became the owner of two-fifteenths of said estate. In November of the same year George Sapp conveyed his interest to one W. A. Smith, who, in turn, conveyed the same to plaintiff Kerr, by reason of which Kerr became the owner of an undivided one-sixth of the estate. Defendant Annie Yager is the daughter of Allen House, and Chris Yager is her husband. Defendants Yager and Yager claim title to all the property in controversy in virtue of a warranty deed for the same to them executed by Allen House and wife on July 27, 1904. They also pleaded that James H. House during his lifetime and some time prior to the year 1876 sold and transferred the property to his son Allen by oral contract, and that, pursuant to such sale, Allen took possession of the land, made improvements thereon, and ever thereafter paid the taxes on the premises. They also procured an assignment from Allen House in the following terms:

Having sold to my daughter, Anna Yager, and her husband, Chris Yager, lot 6 and all of lot 5, except the west eleven acres thereof in section No. 18, township No. 78, range 45, Harrison county, Iowa, and given the said Anna Yager and Chris Yager a warranty deed to the said land, I hereby sell and assign to said Anna Yager and Chris Yager, my claim against the several plaintiffs and defendants in the suit of John D. Kerr et al. vs. Anna Yager et al., commenced in the district court of Harrison county, Iowa, for the January term, 1907, the said taxes having been paid on said land by me under claim of ownership, believing that I was the owner of the land under oral sale and gift from my father, James H. House. And I hereby authorize my said daughter and her husband, Anna Yager and Chris Yager, to collect said taxes and the interest thereon from the several claimants of said property in said suit, if it shall be found by the court that the plaintiffs and defendants are entitled to any part of said land, and authorize them to claim the

same as an offset against any claim of the plaintiffs or defendants in said suit.

Dated Missouri Valley, Iowa, this 29th day of December, 1906.

his
Allen X House.
mark

And, after averring that Allen paid taxes on the land to the amount of \$275.81, they asked to be protected in any event to the amount of these taxes which should be charged proportionally against any adverse interest in the land. They also pleaded that they went into the possession of the land some time in the year 1890 or 1891 under an arrangement with Allen House, believing that they were the owners thereof, and that they have ever since been in the continuous, open and adverse possession of the property. They further pleaded the adverse possession of their grantor, Allen House, for the full statutory period, both before and after the death of his father. Repleading the same facts, they asked that their title to all the premises be established and quieted in them. As to defendant Eliza Sapp, they pleaded that deceased, James H. House, made a conveyance to her which was to be in full of her share in his estate, and that she accepted the same as such, and that plaintiff Kerr took nothing under his deed from George Sapp. They also pleaded that, since they took possession under their deed from Allen House, they cleared off the property at an expense of \$50, and made improvements thereon of the value of \$2,250, and they asked that these matters be also taken into account in the event their title was not confirmed. In a reply to the pleadings setting up these various matters plaintiffs denied most of the affirmative statements, and pleaded the statute of frauds. They also pleaded that the rents and profits of the land should be offset against the claims for taxes. They also asked that, if it be found that the Sapp heirs had nothing in the land because of the conveyance to their mother, that their interest in the lands be proportionately increased. Plain-

tiff Sadie Kerr also pleaded that she was a minor fifteen years of age, and that the statute of limitations could not and would not run against her until after she became of age. The other defendants filed pleadings which are not now material because they seem to be content with the decree as rendered. That decree was to the effect that Yager and Yager were and are the owners of the property in fee simple. It also established and confirmed their title and dismissed plaintiff's petition. The facts so far recited being undisputed, and the appeal having been taken by plaintiffs alone, it is manifest that the only issues to be considered are those arising between plaintiffs and defendants Yager and Yager. The record title was in James H. House at the time of his death, and the burden was and is on the defendants Yager and Yager to show that the said James sold the land to his son Allen House in his lifetime as claimed, and that thereafter Allen conveyed the same to them, or that they took possession of the land under the warranty deed from Allen and his wife to them of date July 27, 1904, and that they have since held possession thereof, claiming to own the same, and that their grantor, Allen, held adversely since the year 1896. If the latter be the finding, it would not in itself be sufficient to bar the title of Sadie Kerr, for she is a minor, and the statute of limitations would not run against her. We may for the purposes of this opinion dismiss all other claims save those made by appellees Yager and Yager in the briefs filed by them: (1) That they hold title to all the land by adverse possession; (2) that there is sufficient evidence to show an oral sale of the land by James H. House during his lifetime to his son Allen in consideration of services performed followed by the sole possession and occupancy thereof under said contract for more than ten years, and the making of improvements thereon; and (3) that, in any event, they are entitled to an allowance for all taxes paid, for improvements placed upon the land, and for the value of labor performed in putting into condition for cultivation.

It should be stated in this connection, in order to avoid confusion, that Allen House may have acquired title to the land by adverse possession before the death of his father, and, if that be true, plaintiff Sadie Kerr (minor) would have no interest therein.

I. The primary and pivotal question in the case is this: Did James H. House during his lifetime sell the land by oral agreement to his son Allen? And incidental thereto did

1. PARTITION: ad- the son Allen go into possession thereof and
 verse posses-
 sion: burden thereafter sell the land by warranty deed to
 of proof: evi- defendants Yager and Yager, and did they
 dence. or either of them go into possession, claiming to own the
 entire title, and use and occupy the land for any full ten-
 year period? Upon these questions the burden is upon the
 defendants Yager and Yager. Originally the land was
 covered with a heavy growth of timber, and was unoccupied,
 and the evidence tends to show that some time during the
 years 1873 and 1874 Allen House, by agreement with his
 father, undertook to, and did, clear the land of all saw lumber,
 and caused the same to be sawed, and the lumber was sold
 and the money turned over to the deceased James H. House,
 and defendants produced evidence to show that after this
 was done, and some time in the year 1876, the father said
 to his son Allen, "I will give you this land if you will take
 it and pay the taxes on it for what you have done for me in
 clearing it off." Testimony was also offered to show that the
 son Allen accepted the proposition, took possession of the
 land, and paid the taxes thereon. The testimony as to the
 possession taken by Allen is not very strong. It seems that
 thereafter he took timber therefrom for fuel and for posts.
 The land was unimproved and unfenced, save that some small
 garden spots were inclosed, and for a portion of the time part
 of it was in the possession of squatters. Cattle and stock
 ran over the land almost at will, and until the time the
 Yagers took possession squatters lived upon portions of it,
 and they never paid any rent, although they built some
 shanties thereon, and cultivated some small garden spots.

Yager moved upon the land under an arrangement with Allen House about the year 1890, and immediately began its improvement. He fenced it, cleared it off, and made valuable improvements thereon.

Most of the testimony offered to show the sale of the land was objected to as incompetent and as coming from incompetent witnesses, and we may here say that we regard the witness Allen House incompetent to testify to any personal transactions or communications between himself and his deceased father because of the provisions of section 4604 of the Code. As to other relevant issues he was competent.

2. EVIDENCE :
confidential
communica-
tions.

But the witness Mary House, wife of Allen House, was competent to testify to transactions and communications between Allen and his father in which she took no part. Neither Allen nor his wife was a party to the suit, and the wife was not an incompetent witness to the matters of which she gave testimony.

William House, who was not made a party to the suit, was also a competent witness as to conversations he heard from his father. This competent testimony is sufficient as we think to show a parol conveyance of the land by James H. House to his son Allen in consideration of his services in clearing it up, and the further agreement to pay the taxes upon it. This is corroborated to some extent at least, in that he paid the taxes thereafter both before and after his father's death, and down to the time the land was deeded to the Yagers; by the fact that he assumed to control it both before and after the father's death, and to exercise exclusive acts of ownership over it, that he listed it for taxation as his own after the death of his father, and that plaintiff John D. Kerr, who now claims to own a part of it, knew as early as 1892 that he, Allen, was claiming to own it all; and by the further fact that he assumed to own it all and conveyed the entire title by warranty deed to the Yagers. Although plaintiff Kerr knew of this claim as early as the year 1892, he made no objections thereto.

Such being the testimony, we do not think it is open to the objection that it is within the statute of frauds. See *Hotchkiss v. Cox*, 47 Iowa, 655. Aside from this, it was not objected to on that ground, and for that reason the objection was waived. *Holt v. Brown*, 63 Iowa, 319; *Crossen v. White*, 19 Iowa, 109; *Graves v. Clark*, 101 Iowa, 738.

The satisfaction and release of a preexisting debt is a sufficient consideration for a conveyance and amounts to such payment as to take the case out of the statute of frauds. See the *Hotchkiss* case, *supra*. If Yager's case depended upon a parol gift, which must, to be sufficient, be followed by actual possession, if not by the making of improvements thereon, we should have more difficulty with it. But, as the conveyance was made in consideration of the son's past services, we think the agreement was something more than a gift. It was a transfer upon a consideration paid, and such acts of possession and ownership as followed are confirmation of the claims made by the Yagers. It would not be difficult to establish the claim of adverse possession against plaintiff John D. Kerr. But this would not dispose of the claim of Sadie Kerr, for as we think the statute did not run against James H. House during his lifetime.

Our conclusion is also supported by competent and uncontradicted testimony that James H. House said to James and Charles House, in the presence of Mary, Allen's wife, about the time of the alleged transfer, that he had given the land to Allen.

Appellant's motion to strike appellees' amendment to abstract is overruled. It was not filed in time, it is true, but it was filed as soon as appellees knew what points appellants were relying upon for a reversal.

5. APPEAL: abstract: time.

We are satisfied after a careful reading of the entire record that the decree of the trial court is right, and it is therefore *Affirmed*.

BRADLEY, MERRIAM & SMITH, Appellants, v. JOHN GOETSCHÉ,
Appellee.

Appeal: MATHEMATICAL ERROR: CORRECTION. A mere mathematical
1 error in calculating the amount of a judgment can be cured on
appeal by ordering a remittitur.

Contracts: PLEADINGS: EVIDENCE. Where the cause of action as
2 pleaded was based upon a written contract to sell goods on com-
mission, admission of evidence of a subsequent oral agreement of a
different character was reversible error.

Appeal from Harrison District Court.—HON. E. B. WOODRUFF,
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION to recover for merchandise sold and delivered. Defendant admitted the receipt of part of the goods, but denied that he received other items charged against him. He also pleaded a settlement and counterclaim. On the issues joined the case was tried to a jury, resulting in a verdict for the defendant in the sum of \$114.32. Plaintiff appeals.—*Reversed.*

H. H. Roadifer, for appellant.

No appearance for appellee.

DEEMER, J.—By written contract plaintiff appointed defendant its agent for the handling of agricultural implements, etc., in the town of Magnolia. By the terms of that agreement defendant was to account for all sales made by him to plaintiff, settling either by cash or notes. We here quote from the contract as follows:

In consideration of the within special commissions, party of the second part agrees to sell for cash not less than one-third of all the goods sold.

All purchasers' notes to be indorsed and payments guaranteed at maturity by said party of the second part, and protest demand and notice of nonpayment waived. A full report of sales and settlements made from time to time by party of the first part shall be forwarded to party of the second part the 1st and 15th of each and every month.

This mode of settlement shall be effective on the respective goods until the following dates: Implements, June 1, 1910; wagons, June 1, 1910; vehicles, June 1, 1910; no additional commission after June 1, 1910.

Any and all goods of every kind, nature and description on hand and in possession of party of the second part at the last-mentioned dates are subject to reshipment on order of party of the first part. If party of the first part does not decide to reship within ten days thereafter, then it is agreed that party of the second part becomes the purchaser thereof, and said party of the second part agrees to purchase, pay and settle for same in cash with interest at 8 per cent from date, at option of party of first part, or if party of first part so elects, said goods on hand at that time shall remain in possession of party of the second part on the basis of this agreement, subject to settlement provided for herein as sales are made only. It is fully understood and acknowledged that the title to and ownership of any and all goods shipped on the basis of this contract shall remain absolute in party of the first part, and the title and ownership shall not pass from party of the first part to party of the second part until full and final settlement has been made between said first and second parties.

All goods shipped by party of the first part to party of the second part during the life of this contract are subject to removal and reshipment without further notice.

In consideration of party of the first part carrying said stock of goods subject to sale, and at the expense of interest for value and special terms given, party of the second part agrees to be fully responsible for all damage or loss by fire or otherwise, to any and all goods shipped under this contract. Party of the second part agrees to pay all taxes and insurance on any and all goods shipped under the terms of this contract.

No settlements made under the terms of this contract are binding on party of the first part until same has been accepted and indorsed at their office in Council Bluffs, Iowa. . . .

This contract shall remain in force and effect until full and final settlement is made between party of the first part and party of the second part.

No agreement or conditions, verbal or otherwise, save those mentioned herein shall be considered in any respect except by written notices duly acknowledged and signed by both parties of the first part and second part. . . .

It is understood and agreed between the parties hereto, provision two, conditions of sale:

That no allowance will be made for breakage unless they occur from manifest defects in material. Breakages thus caused during the first season's use of the machine will be made good by new parts, which will be charged when sent, and corresponding credit will be made only on return of defective parts to factory. Purchaser agrees to pay transportation charges on parts furnished under this provision.

According to the testimony the jury might well have found for plaintiff on items agreed upon by the parties in the sum of about \$110. As a matter of fact it found for defendant in the sum already stated, thus indicating that it disallowed plaintiff's claim entirely and found for defendant on both items of counterclaim. These items were first 5 per cent. commission on cash sales amounting to \$764.96, or as he claims \$43.44; and to be exact we quote the second count of the counterclaim, which reads as follows:

That this defendant entered into the contract referred to herein, and during the years 1909 and 1910 received from the plaintiff goods, consisting of manure spreaders, agricultural implements, and machinery thereunder. That by reason of faulty construction of said manure spreaders, agricultural implements, and machinery, both as to defective materials and workmanship, this defendant has been compelled to expend large sums of money and devote a great amount of time in furnishing new materials and making repairs to the broken and defective parts of said manure spreaders and machinery, amounting in the aggregate sum of \$70.88, items of which are set out in Exhibit E hereto attached as a part hereof. That the prices charged and value fixed for such labor and materials and money expended are reasonable prices and values. That the same have long since been due the defendant, but no part of which has ever been paid.

The total amount for which defendant asked judgment was \$114.32. The trial court gave the following instructions with reference to these items of counterclaim:

(13) The defendant, in addition to his claim that he does not owe the plaintiff on their account, sets up two counterclaims. In count 1 of his counterclaim he says that at the time of the settlement on December 28, 1909, defendant had on hand agricultural implements in about the value of \$764.96, and by the terms of the contract with plaintiff he was entitled to 5 per cent commission on all cash sales, and that he made sales of said implements and made remittance thereof, either by cash or by notes which were accepted as cash, and that there is now due him as commission on said sales \$43.44, no part of which has been paid him and for which he now asks judgment. The burden is upon the defendant on this counterclaim to show by a preponderance of the evidence relating thereto that he is entitled to a commission of 5 per cent on said sales, and, if he has failed to show that he is entitled to such commission, you should allow him nothing on this claim, otherwise you should allow him such sum as the evidence shows he is entitled to, if anything.

(14) The defendant for a further counterclaim says that he received goods from the plaintiff that were faulty in construction and defective in material and workmanship, and that under a parol agreement with the plaintiff, through its Mr. Merriam, he was directed to repair such implements and machinery for which he was to receive a reasonable compensation. He alleges that he performed services and furnished material in the reasonable sum of \$70.88 in the following items: (Here follows list of items amounting to \$70.88.)

(15) As bearing upon the right of defendant to perform such labor and furnish repairs, you should consider for what length of time he was performing such services, if any, and what knowledge, if any, the agents of plaintiff had that defendant was making a claim to compensate for such services, and you should consider such evidence so far as it may throw light upon the question whether the defendant made such a contract with the said Merriam and whether the said Merriam had authority from plaintiffs to make such contracts, and from all the evidence before you it is for you to determine whether defendant is entitled to recover on this counterclaim at all, and, if he is entitled to a recovery, the amount thereof.

Under these instructions the jury evidently allowed the exact amount of defendant's two items of counterclaim, to wit, \$114.32. It is manifest that the trial court was led into two errors:

First. Five per cent. commission on \$764.96 is not \$43.44, but \$38.24. If this were the only error, we might correct it by ordering a remittitur for the difference. But this is not the only trouble in the case.

The second count of the counterclaim is distinctly bottomed upon the written contract of the parties, yet the trial court, over objection, permitted defendant to prove a subsequent oral agreement with one Merriam, a representative of plaintiff, whereby plaintiff was to pay defendant for his services and material furnished in making repairs and gave the instruction which we have quoted. This was entirely outside the issues made by the pleadings, and the trial court erred in receiving the testimony, and in giving the instruction which we have quoted. Again, there was no testimony showing the value of defendant's time or services, and no showing as to the value of some of the articles claimed to have been furnished by him.

For the errors pointed out, the judgment must be, and it is, *Reversed*.

JOHN NELSON V. OMAHA & COUNCIL BLUFFS STREET RAILWAY
COMPANY, Appellant.

Drainage: OBSTRUCTION OF SURFACE WATER. A street railway company
1 has no right to construct its road bed and maintain the same so
as to flood adjacent lands.

Same: DAMAGES: EVIDENCE. The value of crops destroyed by flooding
2 the land upon which they were growing is competent evidence in an
action by a tenant for such injury caused by an obstruction of
flood water.

Appeal from Pottawattamie District Court.—HON. O. D.
WHEELER, Judge.

FRIDAY, DECEMBER 13, 1912.

THE facts are stated in the opinion.—*Affirmed.*

Tinley & Mitchell, for appellant.

George H. Mayne, for appellee.

SHERWIN, J.—Action to recover damages claimed to have been suffered by the overflowing of lands occupied by the plaintiff as a tenant during the years 1907, 1908, and 1909; said overflow being caused by an embankment constructed by the defendant on its right of way. The facts in the case, without serious question, show that Nelson, the plaintiff, held a lease during the years 1907, 1908, and 1909 and for several years prior thereto on about seventy acres of land lying west of Thirty-seventh street and north of the right of way of the defendant, in the western part of the city of Council Bluffs, lying north of the street railway line belonging to appellants, and bounded by the Missouri river on the north. Nelson also owned a tract of land of about three acres, bounded on the north and west by the land which he rented and on the east by Thirty-seventh street. The south line of the three-acre tract owned by Nelson extended to the west would be the south line of the seventy acres which he leased. The tracks of the street car company run directly from Thirty-seventh street for a little over an eighth of a mile, then southwest for about a quarter of a mile to the bridge. The bridge of the street car company is a combined street railway and wagon bridge, and the approach to their wagon bridge is an extension of Broadway to the west and southwest, parallel to the street car tracks. The evidence shows without dispute that a depression or swale, varying in width from fifty to three hun-

dred feet, commencing near the northwest corner of the land leased by Nelson extended irregularly in a southeasterly direction to the south line of the land leased by Nelson, thence in a southerly and southwesterly direction to the Missouri river, and that this swale or depression was the natural waterway for the surface and overflow water from the land in controversy for a period of almost thirty years. The center of this depression or waterway would be at about the point where the turn is made to the southwest in the track and wagon approach of the street car company. When the bridge and street car line was constructed about 1886, the tracks and the driveway were built over a trestle of several hundred feet in length which spanned this swale or depression, allowing free passage for the surface and overflow water in the same manner as before it was built. During the years 1902 and 1903, this trestle under the tracks was filled in by a solid embankment of earth, and during the years 1906 and 1907 the trestle under the driveway to the bridge was similarly filled in. At the time this work was done and for the purpose of permitting the surface and overflow water to flow through its former channel, the company put in at the lowest part of said depression two twenty-four-inch tile or pipe, one under the street car tracks and the other under the driveway. There was also put in by the company a twenty-one-inch pipe running from the lowest part of the depression along the northerly side of the street car track to the river. The evidence shows without conflict that prior to the building of the embankment and the stopping up of the trestle the overflow and surface water would pass on through its natural course to the river, and did not gather or stand on the land in controversy.

Plaintiff, Nelson, during the years 1907, 1908, and 1909, as in prior years, put in a crop on the land in controversy, planting about forty or fifty acres of corn. During the summer of 1907 the Missouri river overflowed its bank at the northwest corner of the land in controversy, and continued high enough to flow over that land for a period of about two days,

or a little less. The overflow of water, following the depression before referred to, ran down until it reached the railroad embankment, and this caused it to back up and stand on the land during the balance of the summer, greatly injuring the crop; the pipes under the track being stopped up. Substantially the same thing occurred in 1908. In 1909 the river did not come over, but the water collected to about the same extent as the result of very heavy rains. The evidence shows that there was five or six feet of water north of the grade, and no water on the south side. It is perfectly apparent from the evidence that but for the grade there would have been no water on the land, except for the very short space of time when the river was overflowing its bank at the northwest corner; that but for the stopping of the water by the embankment plaintiff's crop would have been but little, if any, injured. Owing to the water not being able to get away, it stood on the land during a period of several months, totally ruining each year from twenty to thirty acres of the crop, which the undisputed evidence shows was worth at the time of the overflow \$15 per acre. The defendant did not plead, nor is there any evidence tending to show, that it owned any land except the right of way for its track and the approach to the bridge, so there is no question before us touching the defendant's right to dike to protect its own land, and the authorities cited by it in support of such right are therefore not in point.

I. On this branch of the case but one point is present for determination, and that is whether the defendant has the right to so construct and maintain its embankment for track purposes as to flood the land above it. And this question is settled adversely to appellant in the following cases: *Brown v. Armstrong*, 127 Iowa, 175; *Albright v. Railway Company*, 133 Iowa, 644; *Keck v. Venghause*, 127 Iowa, 529.

II. Error is alleged in overruling appellants' motion to strike certain testimony as to the value of crops destroyed. This evidence was evidently admitted under the rule announced

in *Harvey v. Railway Company*, 129 Iowa, 465, (referred to by counsel on both sides without giving the citation), and was competent. See, also, *Jefferis v. Railway Company*, 147 Iowa, 124, and cases cited therein on this point, and *Blunck v. Railway Co.*, 142 Iowa, 146.

We find no error in the record, and the judgment is therefore *Affirmed*.

HENRY SCHRADER and FRANK SCHRADER, Appellees, v. LOUISA SCHRADER and DORA SCHRADER, Appellants.

Wills: REMAINDERS: WHEN VESTED. The provision of a will that the
1 remainder shall pass to remaindermen on the death of the life tenant, has reference to the time when the remaindermen shall come into possession of the property; and, in the absence of language requiring a different construction, will not prevent the vesting of the remainder immediately upon the death of the testator. In the instant case the testator gave his personal estate and a life interest in all of his real estate to his wife, and provided that upon the death of the wife a certain tract of land should be divided among his three sons; *Held*, that the vesting of the remainder was not postponed until the death of the widow.

Same: CONDITION SUBSEQUENT: VESTING OF REMAINDER. As between
2 contingent and vested estates courts incline to the latter, whenever it can be done without violence to the language of the instrument. Thus, a devise made upon the condition that a remainderman pay a stated sum of money to another person, with no limitation over upon failure to make such payment, is a condition subsequent and not precedent to the vesting of title; and is in the nature of a legacy to the third person so designated, to be treated as a charge upon the land devised. In the instant case a clause in the will providing: "that before George Schrader shall become the sole, absolute and unqualified owner . . . he shall pay to . . . Henry Schrader the sum of \$500" in the connection used is held to have created a condition subsequent.

Ladd and Deemer, JJ., dissenting.

Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION for construction of will. Both parties appeal, but the appeal of the defendants being first perfected they alone will be denominated appellants.—*Reversed in part and Affirmed in part.*

Van Vleck & Holmes, for appellants.

Mills & Perry and *Franklin & Miller*, for appellees.

WEAVER, J.—John Peter Schrader died leaving a will, which has been duly admitted to probate. The meaning and effect of two clauses of said will having become a matter of dispute, this action was brought for their construction. Having first given his personal estate and a life interest in all his real estate to his wife, he undertakes to devise the remainder over in certain described tracts of land to his sons George, Henry, and Frank in the following manner: By the first of the disputed clauses he provides that a certain described tract of land shall, on the death of his wife, Dora, be equally divided between his sons, George, Henry, and Frank, and then adds, "It is further my will that in the event that the said Dora Schrader shall die before I do that upon my death the last described premises shall be equally divided between my three sons." By the other clause it is provided as follows: "If my well beloved wife Dora Schrader shall live after me, then it is further my will that on the death of said Dora Schrader my well beloved son, George Schrader, shall become the sole, absolute and unqualified owner, on the condition hereinafter expressed, of the following described real premises: [Here follows description of land other than that mentioned in the first clause.] It is the express condition that before George Schrader shall become the sole, absolute and unqualified owner of said real premises that he shall pay to my well beloved son, Henry Schrader,

the sum of \$500. And it is further my will that in the event my well beloved wife, Dora Schrader, shall die before I do that upon my death the said last above described real premises shall pass to the sole, absolute, and unqualified ownership of my son George Schrader, upon condition that he, my son George Schrader, shall pay to my son, Henry Schrader, the sum of \$500."

The testator died October 1, 1904, survived by his wife and three sons, above named. Thereafter, on June 8, 1906, the son George Schrader died intestate, leaving surviving him his wife, Louisa Schrader, and his infant daughter, Dora Schrader, his only child and heir, who are the defendants in this proceeding. George Schrader did not in his lifetime pay the said sum of \$500 to his brother Henry; nor had it been paid by the widow or child of George when this action was instituted. On July 23, 1909, Dora Schrader, widow of the testator, died, and upon the lapsing of her life estate in the lands above described, question at once arose as to what interest therein, if any, accrued to the widow and child of George.

It was and is the contention of Henry and Frank that under the terms of the will George Schrader took no vested interest in any of said lands upon the death of their father, but that the devise to him was contingent upon his surviving their mother, the life tenant, and, having died before such devise became effective, and before acquiring any heritable estate in the property, no interest therein of any kind passed to his wife or child.

The trial court held and decreed that, under the devise of the first tract of land, George Schrader acquired a vested estate in the remainder of the undivided one-third of said tract, and that upon his death this interest passed to his wife and child. From this part of the decree the plaintiffs have appealed. As to the land last described, the court found that the devise of this tract made the payment of \$500 to Henry a condition precedent to the vesting in George of any right or interest in the remainder over after the death of his

mother, and as a necessary result of such conclusion it was decreed that he never acquired a heritable estate in such property, and that his wife and child acquired no interest therein through him. From this finding and decree, the defendants have appealed.

I. Giving first attention to the plaintiff's appeal, it is very clear that if their claim has any substantial foundation it is in the provision that this land is to be divided between the three sons "on the death of the said Dora Schrader." If it was clear that the testator thereby intended to make this devise to his three sons contingent upon their survival of their mother, and that neither was to acquire any estate therein until her death, then, of course, such intention would prevail, and plaintiffs should have a decree in their favor. But it is a well-settled rule that an intention to postpone the vesting of a remainder over until the death of the life tenant will never be inferred from language such as is here employed. It has been held in a multitude of cases that, in the absence of other language necessitating a different construction, a provision that the remainder over shall pass to the remaindermen "on the death" of, "at the death" of, or "after the death" of the life tenant, or other terms of like import, has reference to the time when the devisee shall come into the right of possession and enjoyment of the property devised, and will not prevent the vesting of the remainder immediately upon the death of the testator. See *Archer v. Jacobs*, 125 Iowa, 480; *Shafer v. Tereso*, 133 Iowa, 342.

The case before us is clearly one calling for the application of the rule of these precedents, and, as we have no inclination to depart from or discredit it, the decision of the trial court, so far as it is involved in the plaintiff's appeal, must be affirmed.

II. Proceeding next to the matter of the defendants' appeal, we have to inquire whether it was the intention of the

testator, as expressed in his will, to make the payment of \$500 by George Schrader to his brother Henry

2. SAME: condition subsequent: vesting of remainder. a condition precedent to the acquirement by George of any right to or interest in said land, or was it his purpose to make the gift to Henry a charge upon said property in the hands of George, and thus safely secure its payment.

The trial court, it seems, held to the former theory of construction, but after considerable investigation we are led to adopt the latter. In the first place, as between contingent and vested estates, conditions precedent and conditions subsequent, forfeitable rights and nonforfeitable rights, the courts always incline to the latter whenever it can fairly be done without violence to the language of the instrument under which the claims of the parties are asserted. In no class of cases can this rule be more equitably applied than in the adjudication of rights dependent on the construction of wills.

It must be presumed that in making his will the testator undertook to provide for what he deemed an equitable division of his estate. Without the condition in question, George would have obtained considerably more than one-third of his father's real estate, and the testator apparently sought to equalize the distribution by requiring George to pay \$500 to Henry.

There is no reason for thinking he intended to do anything more than to insure such equalization by making the payment of said sum a positive and unequivocal charge upon the land, and this is as effectually accomplished by treating the provision as creating a lien or providing a condition subsequent as it would be by considering it a condition precedent. The recital in the devise that George is to become the sole, absolute, and unqualified owner of the land on the death of Dora Schrader is not sufficient to postpone the vesting of his estate in remainder. The reference to the death of the life tenant means no more here than it means in the first

clause of the will, where we have just construed it as referring, not to the time when the estate in remainder should vest, but to the time when the devisee should come into full ownership, and be entitled to the possession and enjoyment, of the property.

Much stress is laid by the plaintiffs on the use of the words "sole, absolute and unqualified ownership" and other expressions of like nature; but we think, when fairly construed in the light of the admitted facts and the authorities hereinafter cited, they mean no more than that the title in the hands of George Schrader shall be subject to Henry's claim. In other words, that George shall not be permitted to take the land or dispose of it, free and clear of this burden, until that claim is paid or discharged. That the testator regarded it as a lien or charge and not a condition precedent is made evident by the fact that he did not attempt to devise the fee to any one else, in case of George's failure to make the payment.

As sustaining the soundness of this view and illustrating the strong tendency of the courts to hold conditions affecting title to lands to be subsequent rather than precedent and to construe conditions involving the payment of money, even when expressed in positive terms, to be in the nature of covenants, strict performance of which will not result in loss or forfeiture of valuable rights, we call attention to the following:

In Schouler on Wills, section 598, the author says: "No criterion is afforded by the choice of technical expressions, but the probable intention of the testator must determine the construction in every case of the kind." The fact the will does not provide for a devise over to another on failure of the first-named devisee to perform the condition attached to the gift is by all authorities considered a circumstance of much weight, indicating that the condition is not precedent to the vesting of an estate. *Cunningham v. Parker*, 146 N. Y. 29, (40 N. E. 635, 48 Am. St. Rep. 765;) *Hoss v. Hoss*, 140 Ind. 551, (39 N. E. 255;) *Hanna's Appeal*, 31 Pa. 53; *Pearcy*

v. Greenwell, 80 Ky. 616; *Vandevort's Case*, 62 Hun, 612, (17 N. Y. Supp. 316).

Even where the will provides in so many words that a certain act shall be a "condition precedent" to the vesting of gift, it will be held a condition subsequent if, upon consideration of the entire instrument, it may fairly be done. *Winn v. Tabernacle*, 135 Ga. 380, (69 S. E. 557, 32 L. R. A. [N. S.] 512).

A devise to the effect that the testator's sons should have certain real estate by paying a stipulated amount to their sisters was held not to create a condition, but a charge on the land. *Taft v. Morse*, 4 Metc. (45 Mass.) 523.

A devise to A., on condition that he pays a legacy to B., charges the legacy on the land. 2 Jarman on Wills (6th Ed.) 2000.

A devise to A., "on condition that he pay my grandson B. \$300," is not a conditional devise, but gives to B. a legacy of \$300, charged upon the land. *Woods v. Woods*, 44 N. C. 290.

A devise to A., "upon the express condition" that he pay B. \$700 before the 1st day of April after the testator's death, is not a condition precedent, and B. obtains thereby only an equitable lien on the land. *Casey v. Casey*, 55 Vt. 518.

Where the devise was to A. for life, with the remainder to B. on condition that he pay a given sum to C., it was held that if the testator intended that the money should be paid after the termination of the life estate (which was clearly the intent in the case at bar) the remainder vested immediately on the testator's death, and the payment was a condition subsequent. *Duncan v. Prentice*, 4 Metc. (61 Ky.) 216. See, also, *Leighton v. Leighton*, 58 Me. 63.

"If this act does not necessarily precede the vesting of the estate, but *may accompany* or follow it, if this is to be collected from the will, the condition is subsequent. It is in all cases a question of intention, and not of phrase or form." *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701.

Where land is devised at a valuation fixed in the will,

such price to be paid by the devisee to the executor, the title passes on the death of the testator, subject to the lien for the stated price. *Hart v. Homiller*, 23 Pa. 39.

A life estate was given to the wife, with remainder to a son on condition that he pay \$4,000 to other children of the testator. The payment was held not a condition precedent, but the legacies were a charge upon the land; the son taking but an equity of redemption, which could be foreclosed in a court of equity. *Warren v. Bronson* (Vt.), 69 Vt. Rep. 655. See, also, *Wahl's Estate*, 8 Pa. Co. Ct. R. 309; *Smith v. Smith*, 48 Hun. 617, (1 N. Y. Supp. 643); *Pearcy v. Greenwell*, 80 Ky. 616.

In the last-cited case it was held by the Kentucky court that failure to perform a condition though precedent, does not work a forfeiture of the devise, where there is no devise or limitation over upon failure of performance by the devisee. To same effect, see *Maddox v. Maddox*, 52 Va. 804. It is also held in Indiana that a condition attached to a devise will not be enforced as precedent, where there is no limitation over, upon failure of the devisee to perform. *Crawford v. Thompson*, 91 Ind. 266 (46 Am. Rep. 598).

A devise, made "only upon condition that the devisees pay to my executors" a specified indebtedness, no limitation over being provided, was held not to create a condition precedent. *Cresswell v. Lawson*, 7 Gill. & J. 227.

After a somewhat extended search of the authorities, we have failed to find a decision holding that a devise made upon condition that the devisee pay a stated sum of money to another person, and providing no limitation over upon failure to make such payment, has been held a condition precedent. On the contrary, the cases hold with great unanimity that such a provision is in the nature of a legacy to the third person so designated, and is to be treated as a charge upon the land so devised. This is the holding in many of the cases already cited. In addition thereto, see *Sherman v. Association*, 113 Fed. 609, (51 C. C. A. 329); *Gingrich v. Gingrich*,

146 Ind. 227, (45 N. E. 101); *Colby v. Dean*, 70 N. H. 591, (49 Atl. 574); *Kratz v. Kratz*, 189 Ill., 276, (59 N. E. 519); *Skillman v. Van Pelt*, 1 N. J. Eq. 511; *Smith v. Smith*, 48 Hun, 617, (1 N. Y. Supp. 643); *Taft v. Morse*, 4 Metc. (Mass.) 523; *Pennington v. Pennington*, 70 Md. 418, (17 Atl. 329, 3 L. R. A. 816).

In the last-cited case the will provided that "before any person or persons herein named shall have possession or property under this will he or she shall pay" certain specified sums to other members of the family. This language, it will be observed, is as strong and imperative as the language in the will now before the court; but it was held not to prevent the vesting of an estate.

Finally, it should be noted that the will fixes no time in which the \$500 is to be paid. It cannot be presumed that the testator contemplated payment thereof before the expiration of the mother's life estate. It would be even more unreasonable to say that payment must be made at the instant of her death, in order to prevent a loss or forfeiture of the devisee's right. There is nothing to suggest that the testator contemplated the possibility that the title of the ownership of the estate should be suspended or have no existence in any one between the instant of the life tenant's death and the appearance of the remainderman with a tender of the money.

If no estate ever vested in George Schrader, when did it vest in Henry and Frank? Certainly not on the death of their father. If it vested on the death of their mother, then what opportunity has George or his heirs had to meet the condition imposed by the will?

The testator's purpose, as indicated by the will, was to give his wife a life estate, subject to which he undertook to divide one piece of land between his three sons and to give the other tract to George, charged with a payment to be made to Henry. This will be effectively accomplished by permitting the defendants, as widow and heir of George, to take the land, subject to the burden which the will imposes upon it. Such

a holding works no wrong to any one—a proposition which can hardly be affirmed of any other result.

It follows that upon defendants' appeal the decree of the trial court must be reversed, at the cost of the plaintiffs.

Reversed on appeal of the defendants. *Affirmed* on appeal of the plaintiffs.

LADD, J. (dissenting). I am unable to agree to the construction put on the clause of the will considered in the second division of the opinion. In no clearer terms could the testator's intention that George Schrader be required to pay Henry \$500 as a condition precedent to the vesting of title in him as devisee have been expressed. Indeed, this is so manifest that the decision of the majority falls little short of holding that a testator cannot attach a condition of this kind to a gift of land and have it regarded as precedent to the vesting of title. But the authorities are otherwise, and it is conceded that the canons of construction enumerated do not exact construction of a condition as subsequent when this will do violence to the language of the instrument under consideration. The testator was dealing with two contingencies (1) that of his wife outliving him, and (2) that of his wife dying before he did, and conditions were specified accordingly. Should his wife outlive him, the gift was not in *præ-senti*, but if the language employed is to be accorded its ordinary meaning, to become operative in the future, for this clause reads: "If my well beloved wife Dora Schrader shall live after me, then it is my further will that on the death of said Dora Schrader my well beloved son . . . shall become the sole, absolute and unqualified owner, on the condition hereinafter expressed, of the following described real premises." Were this all, there might be room for the argument indulged by the majority and some of the authorities would be in point; but the testator's intention that the gift should not be present is put beyond doubt by the wording of the condition annexed: "That before (not after) George Schrader

shall become the sole, absolute and unqualified owner. . . . he shall pay to . . . Henry Schrader the sum of \$500." Could the testator in plainer terms have expressed his intention that before the gift should vest in George he must pay Henry? That such was his purpose is made clearer by the circumstance that later on he directed that in the other contingency of his wife dying before he did George should take the land on condition he pay Henry the amount named—a condition subsequent. Why specify the two contingencies if the conditions were intended to be the same?

As stated in the majority opinion, the law favors the vesting of estates and avoids the abeyance thereof, or intestacy, as to any portion of the property whenever possible, and when a condition merely exacts the payment of a consideration it will be construed, if possible, as a condition subsequent rather than a condition precedent; but where the language of the instrument is clear and unambiguous, as in this will, and is incapable of any other construction than as a condition precedent, if accorded its ordinary and usual meaning, there is no room for the application of these rules; and the courts, instead of undertaking to apply them and distribute the estate according to their notions, should acquiesce in the plain terms of the will and carry out the manifest intention of the testator. The majority undertake to build an argument on the theory that the payment by George was essential to equalize the distribution of decedent's estate. No evidence was adduced; the cause having been submitted on the pleadings, in which no facts bearing thereon were admitted. We have no means of knowing the relative values of the gifts to the three sons, nor of the advancements previously made to any of them, and therefore are limited to determining the meaning of this clause of the will from the language employed. We have no reason for saying that the consequences the majority insist on obviating were not those decedent had in mind. Surely the cutting off of a daughter-in-law and a grandchild from participation in a decedent's estate is not so unusual or un-

natural as to justify the inference that the language employed was intended to import a meaning exactly the opposite of that made use of; that in using the word "before" the testator in fact meant "after."

Again, it is argued that, inasmuch as payment was to be made before George became the absolute and unqualified owner, this indicated an intention that he should become owner subject to the payment of the amount exacted to Henry. But the gift is described in other portions of the clause in the same fashion, and it is as such owner that he was to become only on the condition named. In other words, the only gift was the absolute and unqualified title, and the condition was annexed to this, and not to some lesser or qualified estate.

It will be noted that not a single authority cited in the above opinion is in point, save as illustrating the inclination of courts to construe the language of wills as creating conditions subsequent, whenever this may be done without distorting the meaning of the English language. This may be made clearer by an examination of the facts in some of the decisions most favorable to the ruling of the majority. In *Pearcy v. Greenwell*, 80 Ky. 616, the will provided that "all of my land on the west side of the road be equally divided between John Greenwell and Ralph Greenwell upon condition that they pay \$700 to my wife in one and two years, one-half each year, to be her absolute property, and \$500 to the elder of this district of the Methodist Church, to be by him paid over to Kentucky Conference for the benefit of superannuated preachers; also that they give Jeremiah Smith a good horse, bridle and saddle." Manifestly this was a condition subsequent, and the statement of Hargis, C. J., that "the general rule is, where there is no devise or limitation over to take effect upon failure to perform a condition annexed to the devise, the failure to perform the condition, though precedent, does not forfeit the devise, such condition being construed a condition subsequent," was pure *dicta*, and

a somewhat exhaustive search has discovered no authority sustaining the proposition.

In *Maddox v. Maddox*, 52 Va. 804, the condition was held to be void as in restraint of marriage, and against public policy as enjoining a named belief.

In *Cunningham v. Parker*, 146 N. Y. 29, (40 N. E. 635, 48 Am. St. Rep. 765) the devise was "on the condition and proviso that he [devisee] pay to the above-named legatees respectively the legacies herein given within the period of four years after my decease, without interest, and the real estate so devised to my son Alexander Whitford is charged with the payment of the same." Upon testator's death, the devisee went into possession, and subsequently died without discharging the legacies, and the issue was whether title had passed to him, and, of course, the court held that it had, as this was in no wise inconsistent with the language of the will.

In *Hanna's Appeal*, 31 Pa. 53, the devises were "upon condition that they [devisees] pay to my executors, within four years after my decease, such sum as from the valuation of said tracts of land, with due regard to proportion, it shall be necessary to raise out of said tracts in order to pay the legacies heretofore directed to be paid by my executors, and if he fail to pay such sum on demand, I direct my executors to make sale of so much of said lands as may be necessary to raise the just proportion of said fund, and make a sufficient conveyance to the purchaser." The court held that title vested in the several devisees; that the legacies were mere liens; and that the power conferred on the executor related solely to the remedy. These and like cases cited in the majority opinion furnish little or no support to the conclusion reached.

I cannot escape the conclusion that the recital in the will is not that of a present gift, but of a gift "on the death of the said Dora Schrader." It is then "that George Schrader is to become sole, absolute and unqualified owner." This, however, is "on condition hereinafter expressed," and the

expressed condition is "that before George Schrader shall become the sole, absolute unqualified owner . . . he shall pay to . . . Henry Schrader the sum of five hundred dollars." The testator having by apt words unequivocally indicated an intention that the payment be exacted before the vesting of the gift, this court, regardless of its own notions, of the propriety of annexing such a condition, ought to construe the will accordingly. Were this done, there would be no escape, as I think, from the conclusion that the payment was intended as a condition precedent to the vesting of title.

I am of opinion that the ruling of the district court in decreeing that title under the will never vested in George Schrader or his heirs should be affirmed.

DEEMER, J., concurs in this dissent.

In the Matter of the Estate of EDWARD A. OLDFIELD, deceased.

NANCY BOWIE V. WM. TROWBRIDGE, Executor, Appellant.

Contracts: PERSONAL SERVICES: RECOVERY ON QUANTUM MERUIT: EVIDENCE. One basing an action for services entirely upon an express contract cannot recover upon quantum meruit; but direct evidence of the contract is not required to authorize recovery if the facts and circumstances fairly show such agreement. The fact that plaintiff performed services for deceased when taken in connection with the character of the service, absence of relationship, and all the surrounding circumstances, are held sufficient to raise a presumption that plaintiff entered the service under an express agreement.

Same: LIMITATIONS. Where the evidence showed that the service was continuous for a series of years, with the exception of two or three brief absences or visits, that part of the claim accruing more than five years prior to commencement of the action was not barred.

Same: SUSPENSION OF STATUTE. The running of the statute of limitations against a cause of action for the breach of a marriage contract is not suspended by the death of the promisor.

Same: INSTRUCTION. An instruction authorizing recovery for services 4 regardless of the express agreement relied upon by plaintiff was erroneous.

Same: INSTRUCTION: AMOUNT OF RECOVERY: REVERSIBLE ERROR. An 5 instruction authorizing recovery on one count for personal services of more than the amount claimed in the petition was reversible error; it being impossible to determine on appeal how much was allowed on each count.

Appeal: NOTICE: SUFFICIENCY. A notice of appeal need not be signed 6 by the appellant in person; it is sufficient if signed by his attorney.

Same: ABSTRACT: COST OF PRINTING. Where the appellee failed to 7 number the lines or to index his amendment to the abstract the cost of printing the same was taxed to him, but the abstract was not stricken.

Appeal from Carroll District Court—HON. M. E. HUTCHINSON,
Judge.

SATURDAY, DECEMBER 14, 1912.

THE facts are stated in the opinion.—*Reversed.*

Chas. E. Helmer, for appellant.

Brown McCrary, for appellee.

SHERWIN, J.—Edward A. Oldfield, a resident of Carroll, Iowa, died testate December 2, 1910, and the defendant, Wm. Trowbridge, was later appointed executor of his estate. On January 11, 1911, the plaintiff filed two claims against the estate, and later a petition was filed which embodied the two claims. The first count of the petition alleged a promise of marriage and a breach thereof during the lifetime of the deceased, and asked damages on account thereof in the sum of \$5,000, and the second count averred that in 1893 the plaintiff went to work for deceased on his farm at his instance and request and under an express agreement so to do;

that plaintiff continued in the employment of deceased "from September, 1893, to September, 1910, except when temporarily away on a visit, and that the reasonable value of said services during all of said time was \$5.00 per week." Plaintiff alleged that payments had been made to her from time to time during said period, aggregating about \$230, and she asked judgment for her services in the sum of \$3,975. There was a denial of the allegations of the petition, and the defendant further pleaded that whatever breach there was of the agreement to marry occurred more than two years prior to the commencement of this action, and is barred by the statute of limitations. And, as to count 2 of the petition, the defendant alleged that all of said claim which accrued prior to five years before the commencement of this action is also barred by the statute. The case was tried to a jury, and a verdict was returned for the plaintiff for \$5,000. This verdict was reduced \$4,749.00 by the court, and plaintiff's claim therefor was allowed. The defendant appeals.

I. The plaintiff alleged that she went to work for the deceased under an express agreement that she should do so, and, as there is no direct evidence of such agreement, the appellant contends that plaintiff is not entitled to recover on that branch of her case. It is the rule in this state that, where the pleadings are based on an express agreement alone, no recovery can be had on a quantum meruit. *Hunt v. Tuttle*, 125 Iowa 676; *Leonard v. Leonard, Adm'r*, 134 Iowa, 131.

Direct evidence of such an agreement for employment is not necessary, however. If from all of the facts and circumstances appearing in the case it can fairly be said that there must have been such an agreement, it is sufficient.

In 1893 the plaintiff's husband was living and she had five minor children. She then and at the time she went to work for the deceased lived with her children, and, so far as the record shows, with her husband also, in Mondamin, Harrison county. Oldfield was then living on a farm in Sac

1. CONTRACTS :
personal serv-
ices : recovery
on quantum
meruit : evi-
dence.

county, with his wife and family, consisting of several children, and it was to that farm that the plaintiff went in the fall of 1893, leaving her family in Mondamin. Plaintiff was in no way related to the deceased, nor does it appear that they had been acquainted prior to 1892, or that their relations were unusually friendly or intimate at the time that she went to work for him. As we understand the record, plaintiff lived in the house with the Oldfield family from the fall of 1893 until some time in the year 1894, when Oldfield brought her children to her from Mondamin, and thereafter she and her children lived in a small house on the farm for a number of years. Plaintiff's husband died in 1894, but whether before or after the children were taken to the plaintiff in Sac county does not appear. It will be presumed, however, in the absence of any showing to the contrary, that plaintiff's husband had the children with him, and, at least, assisted in their care until his death, and it will also be presumed that plaintiff was at work away from home for the common good of the family, and this because the law will not presume that she had deserted either her husband or her children. The record shows conclusively that plaintiff went to the Oldfield farm for the purpose of working, and that from the first she did do heavy manual labor and soon became of great value to deceased as a laborer. She worked in the fields, took care of stock, and performed any other work there was to do on the farm.

It is a general rule that the fact that one is found doing service for another is *prima facie* evidence of an employment. 26 Cyc. 1410; *Perry v. Ford*, 17 Mo. App. 212. And we think the circumstances surrounding the parties and their relationship as practical strangers raise the presumption that the plaintiff went to work for the deceased under an express agreement. It will be observed that there are no allegations in the petition that there was an express agreement as to the compensation that should be paid for such services.

II. There was no error in overruling the defendant's

motion to strike out all evidence relative to services rendered prior to five years before the commencement of this action. The evidence as a whole tended to show that the service was continuous for the entire time up to at least within a year or two of the commencement of this action with the exception of one or two brief periods when plaintiff was absent on visits, and, such being the case, the statute did not begin to run. *Kilbourn v. Anderson*, 77 Iowa, 501; *Asher v. Pegg*, 146 Iowa, 541, 21 Cyc. 975, and cases cited on page 976.

III. Complaint is made of instructions 10 and 11, because they told the jury, in effect, that plaintiff's cause of action for breach of promise of marriage would be barred, if the breach occurred more than two years prior to Oldfield's death. The death of Oldfield would not stop the running of the statute; and hence it was error to place the time at his death, instead of at the time when the action was commenced. *Widner v. Wilcox*, 131 Iowa, 223; *Black v. Ross*, 110 Iowa, 112. But it is doubtful whether this error in the instructions was prejudicial to the defendant, because of the fact that the undisputed evidence shows that there was a breach of a renewed promise within two years prior to the commencement of the action.

IV. In instruction 14 the court told the jury that plaintiff might recover on her claim for services, if it was found that she performed labor for Oldfield with his knowledge and consent, but without an express agreement fixing the compensation therefor, and that the law would presume that she was to receive pay for such labor. This instruction was erroneous, because it directed a recovery for plaintiff on the finding that she performed labor for Oldfield, regardless of the express agreement under which alone the plaintiff claimed. *Leonard v. Leonard, supra*; *Hunt v. Tuttle, supra*.

V. The plaintiff claimed in her petition that her services

were worth \$5 per week during the entire time of her employment. On the trial there was evidence tending to show

that during a part of the time her services were reasonably worth \$5.50 per week, and in the fourteenth instruction the jury was told that plaintiff should be allowed the reasonable value of her services, not exceeding the entire amount claimed therefor, which was \$3,975, or \$5 per week for the entire time. The instruction was erroneous in this respect, because there was evidence tending to show that plaintiff was not performing service for the deceased during several periods of a month or more, and it is manifest that the instruction authorized a recovery of more than the amount claimed per week. *Miller v. Armstrong*, 123 Iowa, 86; *Baker v. Oughton*, 130 Iowa, 35.

It being impossible to determine what amount was allowed to plaintiff for her services and what amount for breach of promise of marriage, there is no way of correcting this error, and it must be deemed prejudicial.

VI. Instruction No. 15 presented an issue to the jury that was not in the case, as we understand the record, but it was not in our judgment prejudicial to the estate.

VII. Appellant's contention that the evidence is insufficient to sustain the verdict and judgment cannot be sustained. In view of a retrial we shall not discuss this feature of the case, but we are impressed with the merit of both claims made by the plaintiff.

VIII. Appellee moves to dismiss the appeal, because the notice thereof was signed by defendant's attorney, and for alleged informalities in the notice itself.

The statute provides that an appeal is taken and perfected by serving a "notice in writing on the adverse party, his agent, or any attorney who appeared for him in the court below. . . ." There is no requirement that the notice be signed by the appellant in person, nor that his name be signed thereto by his attorney

5. SAME: Instruction: amount of recovery: reversible error.

6. APPEAL: notice: sufficiency.

or agent. Code, Section 319, authorizes an attorney to execute such notice in the name of his client, and we think it broad enough to authorize the attorney to sign such notice for his client. We think it the general rule that the attorney for the appellant may sign a notice of appeal as such attorney, where there is no statutory requirement otherwise. There is nothing in this motion and it is therefore overruled.

IX. Appellant's motion to strike appellee's amendment to abstract because the lines thereof are not numbered and because not indexed is overruled, but the cost of printing such additional abstract will be taxed to the appellee. For the errors pointed out, the judgment is *Reversed*.

7. SAME: abstract: cost of printing.

BUCKEYE TRACTION DITCHER COMPANY, v. W. A. SMITH,
Appellant.

Sales: APPROVAL ON TRIAL: REJECTION. Under a contract to pay cash
1 for a ditching machine on the trial of the same, the purchaser was not bound to accept the machine if it would not do the work for which it was purchased; but as the sale was conditional simply on the ability of the machine to do the work no right of rejection by the purchaser existed on the mere ground of dissatisfaction.

Same: PLEADINGS: EVIDENCE: PREJUDICE. Where plaintiff in an action
2 for the price of a machine pleaded a specific contract and also the reasonable value; but on the trial the rights of the parties were made to turn solely on the question of whether there had been an acceptance, admission of evidence of the reasonable value, though erroneous, was not prejudicial.

Same: ADMISSION OF EVIDENCE. The rejection of evidence concerning a
3 matter not in dispute was proper.

Same: COUNTERCLAIM: EVIDENCE. Where the jury found that there
4 had been an acceptance of the machine by the purchaser, refusal to permit him to show the amount of freight paid under his counterclaim to an action for the price was not prejudicial.

Same: ACTION FOR PRICE: EVIDENCE. Where there was an acceptance
5 of a machine by the purchaser, exclusion of evidence that the author-

ized agent of the seller stated at the time of acceptance that if it did not do the work he need not keep it, was immaterial and without prejudice.

Same: TEST: ACCEPTANCE: PRESUMPTION. Where machinery is purchased subject to test the purchaser is entitled to a reasonable time in which to make the test before he can be required to accept, but he is bound to make the test within such time; and if he fails to do so the law will presume an acceptance.

Appeal from Harrison District Court.—HON. O. D. WHEELER, Judge.

SATURDAY, DECEMBER 14, 1912.

Surt to recover a part of the price of a ditching machine. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

J. S. Dewell and Ross McLaughlin, for appellant.

C. A. Bolter and John E. Priddy, for appellee.

SHERWIN, J.—This action was brought to recover the agreed price to be paid the plaintiff for a ditching machine, and for extras ordered therefor. The defense was that said machine was shipped to the defendant on trial, and that, after trial, it was rejected by him. Defendant also pleaded a counterclaim on an alleged breach of warranty, and to recover back the amount paid the plaintiff on the contract, and for freight paid on the machine, and for other items. Plaintiff denied a warranty of the machine, and pleaded an acceptance thereof. After seeing one of the plaintiff's catalogues descriptive of the machine, the defendant sent the following letter to the plaintiff, under date of June 16, 1908: "Gentlemen: Please ship one of your 11½ inch by 4½ ft. Buckeye traction ditchers to California Junction, Iowa. The ground to be ditched is of a gumbo nature and joint clay mixture, no hard pan or hard soil but all sticky. Terms cash on trial of ma-

chine.” The plaintiff answered this letter on the 18th day of June, asking for more information as to whether the ground to be ditched was very soft or otherwise, and stated that, when the machine was shipped, a man would be sent to start the machine and make settlement therefor. The machine was shipped not long after this, and was tested under the direction of a man sent for the purpose by the plaintiff. This man spent three or four days with the machine, but was unable to make it work well or satisfactorily in gumbo soil. But, on his representations that the machine would work in such soil with a different set of wheels, the defendant paid him \$600 on the purchase price. Further trial was made by the defendant with the aid of men sent by the plaintiff to assist him therein, but the machine never did do satisfactory work in gumbo. The evidence shows that the defendant notified the plaintiff on the 5th day of September, 1908, that he would not accept the machine at the price originally agreed upon, but offered to keep it if plaintiff would accept the \$600 that he had already paid in full payment therefor. There is also evidence tending to show that the defendant authorized others to use the machine long after he had written the letter of September 5th. The case was submitted to the jury on the theory that there was no sale, nor any liability on the part of the defendant, unless it was found that he had accepted the machine after a trial thereof. There was evidence warranting a finding that there was an acceptance, and we now give our attention to the specific errors complained of.

Much of the appellants’ argument is in support of its contention that the sale was conditional, and that defendant was not bound to accept and pay for the machine, if it did not do the work for which it was wanted. There is no question as to the correctness of this position. The defendant was not bound to accept the ditcher, and the court in effect so instructed the jury. The question that was determinative of the rights of the parties was whether or not there had been an acceptance of

1. SALES: approval on trial: rejection.

the machine, notwithstanding its failure to work in gumbo soil. The defendant had work for it in other soil, and, as we have already said, the jury was justified in finding that there was an acceptance after trial. The contract of sale nowhere provides that a sale is conditional on the defendant's satisfaction with the machine. The condition was that it should work in gumbo soil; hence appellant's authorities to the effect that plaintiff might reject it, if it was unsatisfactory to him, are not in point. The defendant's principal objection to the machine was based on the ground that the dirt-carrying buckets would not empty in gumbo without assistance. He knew that such was the case, when he made the payment of \$600 to plaintiff's agent on the condition, as defendant himself states, that other wheels would remedy the difficulty. These wheels were intended to carry the machine over wet ground, and it does not appear that they would, in any way, remedy the fault with the buckets.

Plaintiff pleaded on specific contract, and also alleged that the ditcher was reasonably worth the price charged therefor. The court admitted some evidence offered by plaintiff on the question of value, and rejected evidence offered by the defendant on the same question. As the pleadings stood we think all of this evidence was inadmissible, because the whole case was tried on the theory that the rights of the parties depended wholly on the question whether there had been an unqualified acceptance of the machine by the defendant after trial thereof, and, such being the case, it is manifest that the reception of the evidence complained of was not prejudicial to the defendant.

Further complaint is made, because the court refused to permit the defendant to show the contents of the catalogue that he had ordered from; the evidence being offered for the purpose of showing that the machine was not to be paid for until finally tested. There was no question about this under the contract, and the ruling was therefore correct.

2. SAME: pleadings: evidence: prejudice.

3. SAME: admission of evidence.

Defendant was not permitted to show what freight he had paid. If the ruling was wrong, a question we do not decide, it could not have been prejudicial to the defendant, because the jury found that there had been an acceptance of the machine, and that defendant was not entitled to recover back any sum that had been paid on account thereof.

4. SAME: counterclaim: evidence.

Defendant offered to show that plaintiff's agent, Priddy, stated to him the next morning after the \$600 was paid to him for the plaintiff that, if "we don't make it work, you won't have to pay a cent for it." Priddy had been sent there by the plaintiff to demonstrate the machine, and to settle therefor, and, in the absence of any limitation on his power to settle, it would be presumed that his power was general, and we think the offered testimony was competent, if material. But, if the payment of the \$600 the day before was an unconditional acceptance of the machine, the evidence was immaterial, because it was then too late for the defendant to repudiate it. And, if such was not the case and the acceptance occurred at a later day, it was still immaterial, because the contract was that the machine was not to be paid for unless it was made to work.

5. SAME: action for price: evidence.

The court instructed that, under the terms of the contract, defendant was entitled to receive and test the machine for a reasonable length of time before he would be required to accept or reject the same, and that he would be bound to make a reasonable test thereof within a reasonable time after its receipt, and either accept or reject the same; and, further, that, if he failed to reject within a reasonable time, the law would presume an acceptance. We think the trial court properly construed the contract. The defendant required a trial of the machine, which was to be made by himself, so far as his letter of June 16th indicates, and he did in fact try it in the absence of plaintiff's agents. Under the con-

6. SAME: test: acceptance: presumption.

tract he clearly would have no right to receive the machine and keep it indefinitely without giving it the trial contemplated, and escape liability therefor because he had not tried it.

Criticism is made of the instructions on the question of an acceptance by the payment of the \$600 paid to Priddy, but we think the question was presented in its most favorable light for the defendant, and that the complaint is without merit. Our conclusion is that the case was fairly tried and submitted to the jury without prejudice to any of defendant's substantial rights, and that the judgment should be, and it is, *Affirmed*.

WILE, WEILL & Co., Appellant, v. THE DENISON CLOTHING COMPANY and JULIUS SONKSEN, Appellees.

Partnership: MISAPPROPRIATION OF FUNDS: RATIFICATION: EVIDENCE.

One partner cannot pledge the property of the firm to secure the payment of his own debts, without the knowledge or consent of the other partner; and if he does so the party receiving the same is liable to the co-partnership therefor, unless the injured party has ratified the act. In the instant case one partner upon settlement and dissolution of the firm received all of the firm assets, paying nothing to his co-partner at the time, but upon settlement it was found that the co-partner was indebted to him after allowing everything he was entitled to. *Held*, that there was no sufficient proof of ratification, and that he was entitled to recover against a creditor of the co-partner for firm funds misappropriated to the payment of his individual debt.

Appeal from Crawford District Court.—HON. F. M. POWERS, Judge.

SATURDAY, DECEMBER 14, 1912.

ACTION for balance on account for goods and merchandise sold and delivered. Defendants Denison Clothing Com-

pany and Julius Sonksen filed separate answers, denying any indebtedness to plaintiff and pleading payment and settlement. They also filed equitable answers and counterclaims, which will be referred to in the body of the opinion. Upon the issues joined, the trial court found that plaintiff's account had been settled and paid, and rendered judgment for defendant Sonksen against the plaintiff in the sum of \$219.30. Plaintiff appeals.—*Affirmed.*

Mayne & Hazelton and Harding & Kahler, for appellant.

Shaw, Sims & Kuehnle, for appellees.

DEEMER, J.—Plaintiffs are wholesale clothing merchants doing business in the city of Buffalo, N. Y., and their action is for goods and merchandise sold and delivered to the Denison Clothing Company when one C. C. Kemming was doing business in that name, and for goods sold and delivered said company when the firm of Kemming & Sonksen were doing business in that name. Defendants clothing company and Sonksen deny liability for any goods sold Kemming while he was doing business in the name of the company, and admitted only the last two items of plaintiff's account, amounting to \$301.50. They also averred that Kemming & Sonksen were in business as a partnership for a time under the name of the Denison Clothing Company, and alleged that during the continuance of this partnership Kemming, without the knowledge or consent of Sonksen, took from the partnership funds the sum of \$2,500 and used the same to pay his individual indebtedness to plaintiff. They also averred that Kemming issued partnership checks to plaintiff in payment of his individual accounts, without the knowledge or consent of his partner Sonksen, amounting to the sum of \$1,000, and by way of counterclaim asked judgment against plaintiff for the amount of such payments, after deducting therefrom the amount due plaintiff from the firm of Kemming & Sonksen. For reasons

not material to be mentioned, defendant Sonksen was obliged to forego any claim to the funds received by plaintiff on the checks referred to; and by reason of being unable to show any knowledge on plaintiff's part of the partnership relations existing between him and Kemming until some time in April, 1908, his counsel now concedes that he is not entitled to have considered any payments made prior to that date. The amount claimed by him in the district court was reduced to a sufficient amount to pay the firm debt, to wit, \$301.50, and the further sum of \$219.50; the two sums being, as he claims, the amount paid plaintiffs by Kemming after they had knowledge of the partnership arrangement between him and Sonksen.

There is not much dispute in the facts, and the record discloses the following: For a number of years prior to 1907, C. C. Kemming was engaged in the retail clothing business at the town of Denison, Iowa, under the name of the Denison Clothing Company, and also at the town of Charter Oak, under the name of the Charter Oak Clothing Company. While so engaged, he purchased most of the goods for the price of which this action was brought. On the 4th day of September of the year 1907, he sold to defendant Sonksen a one-half interest in the stock of the two clothing companies. This partnership continued doing business in the name of the two companies until May 15th of the year 1908, when the firm was dissolved; Sonksen taking over the business and property at both places. Sonksen paid Kemming, at the time the partnership was formed, the sum of \$9,000, but assumed none of Kemming's debts. Upon being admitted into the firm, Sonksen went into the store at Denison, and being without business experience he permitted Kemming to keep the books and the bank account, and to purchase and pay for all goods bought. Kemming was at that time largely indebted for goods purchased before the partnership was formed, and after its formation he paid these debts with money belonging to the partnership. The con-

tract of partnership contained these express provisions: "That the said first party shall pay all indebtedness now owing by the said Denison Clothing Company, and the Charter Oak Clothing Company, and shall be entitled to all sums collected on and from accounts now due the said Denison Clothing Company and Charter Oak Clothing Company. . . . That neither of said partners shall permit said joint stock or his share or interest to be in any way charged, incumbered, attached or taken in execution for his own private and particular debts."

And the agreement of dissolution provided, among other things, that:

The business done by the said Denison Clothing Company and the said Charter Oak Clothing Company since the partnership was formed between C. C. Kemming and Julius Sonksen, the parties hereto, up to the time of the execution of this contract is partnership business, and is to be treated, considered and disposed of as such to the party of the second part as part of this contract and without any other or additional consideration therefor; the profits and losses of said business during said period of said partnership are to be shared equally by the parties hereto, and the debts of said partnership are to be borne, share and share alike, by the parties hereto. . . . It is further agreed that all accounts due and owing to the said firm arising by virtue of the partnership heretofore existing between the parties since September 5, 1907, to this date shall be collected by Julius Sonksen, the surviving partner of said firm, without charge; he to make a monthly accounting of same to the said C. C. Kemming. At the end of sixty days from this date the accounts then uncollected shall be placed in the hands of a special collector to be mutually agreed upon, at a commission of not to exceed 5%, unless mutually otherwise agreed. Reports of collections and settlement are to be made monthly to the said Julius Sonksen and C. C. Kemming, share and share alike. All of the accounts belonging to said firm remaining uncollected four months after date hereof shall be sold within thirty days thereafter to Julius Sonksen or to C. C. Kemming, depending upon which shall pay the highest price therefor, and the price thus paid shall be divided be-

tween the parties hereto, share and share alike, and the accounts thus bought shall be the absolute property of the person buying and paying therefor.

After the dissolution of the firm, Sonksen paid all the firm debts; but, learning then for the first time, as he claims, that Kemming had paid his prior individual debts from the proceeds of firm property, he refused to pay any balance due to Kemming individually, and insisted that he was entitled to the money paid by Kemming from partnership assets upon his (Kemming's) individual debts from every creditor of Kemming who knew he was using firm property or assets to pay his individual accounts. Plaintiff's entire account against Kemming individually and the firm of Kemming & Sonksen was \$4,559.52, all but \$301.50 of which was Kemming's individual indebtedness. During the existence of the partnership, Kemming sent plaintiff five \$500 checks, signed "Denison Clothing Co., per C. C. Kemming," and these were credited upon the account. At that time Kemming's indebtedness to plaintiff was evidenced by notes signed by "C. C. Kemming" alone. The testimony shows beyond all controversy that some time early in the month of April, and before the last of the five \$500 checks was sent to plaintiff, it had knowledge, through one of the members of the partnership, that defendant Sonksen had become a partner with Kemming; and the plaintiff firm also had knowledge from the checks themselves that these checks were drawn against partnership funds to apply on the individual debt of Kemming. It is true Sonksen knew, during the life of the partnership, that Kemming was signing checks drawn against the funds of the partnership; but, as the firm was buying goods all the time, he testified that he did not know until after the dissolution of the firm that Kemming was paying his individual debts with such checks. He was, he admits, about the store actively engaged in selling of the goods; but he testifies, and no one disputes him, that he knew nothing of the state of the accounts; that he trusted Kemming with the keeping of

the books, the handling of the bank book, and the payment of bills, and did not know of any misappropriation of partnership funds by Kemming. Kemming himself said that he did not deposit any part of the money received from Sonksen for an interest in the business, or any part of the amount received from his individual accounts in the name of the clothing company; and it sufficiently appears that after charging back to Kemming the amount of his misappropriations, and paying the firm indebtedness, instead of his owing Kemming anything, he (Kemming) was indebted to Sonksen.

Plaintiff's chief contention is that Sonksen ratified the misappropriations of Kemming, and thus estopped himself from claiming anything from plaintiff, and that the trial court was in error in not allowing a recovery, at least to the extent of \$301.50, being the amount of the firm's indebtedness. Whether or not there was such a ratification is a question of fact to be determined from all the evidence.

The only testimony relied upon to show ratification is the following, given by Sonksen himself:

I bought him out in May, 1908, and am now the sole owner of the business. In the settlement, when I became owner of the last half of the business, I did not pay over to him personally any money. There was no occasion for doing so, as he had overdrawn already. Q. What is the fact as to his having misappropriated funds of the partnership during the time of the partnership? A. That was it; it was because of that. Q. Was it a fact that there was no cash to be paid by you to him, owing to the fact that he had overdrawn the account of the firm and had appropriated funds without your knowledge or consent? A. That is the reason. I never paid Kemming, himself, a dollar for the last half of his stock. I did not have any knowledge or information as to any misappropriation of the partnership funds by Mr. Kemming until about the time of the dissolution. I am not owing Mr. Kemming anything under the articles of dissolution. I have paid him all that I owe him. I did not pay him personally any money. It was taken up in overdrafts he had made and moneys appropriated without my knowledge or consent.

But this witness also testified that:

I did not have any knowledge or information as to any misappropriation of the partnership funds by Mr. Kemming until about the time of the dissolution. I am not owing Mr. Kemming anything under the articles of dissolution. He is owing me. I have paid him all that I owe him. He is owing me by reason of the settlement. I did not pay him personally any money; it was taken up in overdrafts that he had made and moneys appropriated without my knowledge or consent.

There is nothing here, as we view it, which shows any ratification of the misappropriation, and the record is wanting in any confirmation of the claim of ratification when the checks were sent by Kemming to the plaintiff. The most that could be claimed here is that defendant has not shown any loss to himself by reason of the misappropriation. He testified, it is true, that he paid nothing to Kemming at the time of or after the dissolution of the partnership; and it also is true that he obtained the entire stock of goods theretofore owned by the firm, but he distinctly testified that, giving credit for everything, Kemming was still his debtor; and the records show that he (Kemming) was adjudged a bankrupt in the federal court of the Southern district of Iowa, and afterwards regularly discharged. His trustee in bankruptcy filed an answer and counterclaim in this case, which concluded with this prayer: "Wherefore this defendant prays that he may be decreed, as such trustee, an owner of an undivided one-half interest of whatever judgment may be rendered herein in favor of his codefendant, and for such other and further relief as equity may demand."

From the decree entered in this case, the trustee did not appeal, so that it appears affirmatively that Kemming was still owing Sonksen something, after taking into account all of Kemming's misappropriations; and the trustee in bankruptcy is satisfied with the decree entered in Sonksen's favor, for he did not appeal. There is no merit, then, in the claims that Sonksen ratified the misappropriations

at the time they were made or afterward; and the testimony clearly shows that, taking into account all the misappropriations made by Kemming, Sonksen is still a sufferer, although he has all the assets of the firm, and did not pay Kemming anything for his interest in the business. The law applicable to the undisputed facts is well settled.

A partner cannot pledge the firm credit, or use the firm property to secure or pay his individual debts. *Brewster v. Reel*, 74 Iowa, 508. One partner cannot, without the knowledge and consent of the other partner, use the partnership property or assets to discharge his own personal obligations. If he does so use the property or assets of the copartnership, the party receiving such property, whether money or other property, in the payment of an individual obligation of one of the copartners, upon receiving the same, is liable to the copartnership. *Janey v. Springer*, 78 Iowa, 619; *Blake v. Bank*, 219 Mo. 644 (118 S. W. 643).

In Shumaker on Partnership the rule is stated as follows: "It is a necessary consequence of the existence of the partner's lien that no partner has a right to apply the partnership property to his own individual uses or debts, and, unless the transferee is a *bona fide* holder for value, the property so transferred may be recovered for the benefit of the firm." Shumaker on Partnership, page 178.

This rule is so well established that it is needless to cite other authorities. The only payment made by Kemming to plaintiff, after notice to plaintiff that the checks were drawn against partnership funds, was the last \$500 check, issued the latter part of April in the year 1908, and the trial court deducted from the amount of this check the amount of the firm debt, to wit, \$301.50, and rendered judgment in favor of Sonksen for the balance, to wit, \$198.50, and allowed interest thereon from April 26, 1908, at the rate of 6 per cent. In this there was no error.

The judgment is therefore *Affirmed*.

HIRSCH, WICKWIRE COMPANY, Appellant, v. DENISON CLOTHING COMPANY and JULIUS SONKSEN, Appellees.

Partnership: MARSHALLING OF ASSETS: RIGHTS OF CREDITORS. In equity partnership property constitutes a fund for the payment of partnership debts, the separate property of the partners being liable for their individual debts; and individual creditors cannot look to firm property until the firm debts are paid, and firm creditors cannot look to individual property until the individual debts are paid. So that where a creditor of a partnership and also of one of the partners received funds of both the firm and the individual, a co-partner had the right to insist that the firm funds should be first applied to the firm debts; especially that portion received after knowledge by the creditor that he was receiving firm funds, and that no part of the funds received should be applied on the debt of the partner, except payments made from his individual funds.

Appeal from Crawford District Court.—HON F. M. POWERS, Judge.

SATURDAY, DECEMBER 14, 1912.

ACTION upon account for goods and merchandise sold and delivered. Defendant Sonksen filed an answer and counterclaim, and upon the issues joined the trial court dismissed plaintiff's petition and rendered judgment for the defendant. Plaintiff appeals.—*Affirmed.*

Mayne & Hazleton, and Harding & Kahler, for appellant.

Shaw, Sims & Keuhnle, for appellees.

DEEMER, J.—This case is ruled by *Wile, Weill & Co. v. Denison Clothing Co. et al.*, decided at the present term. In addition to the authorities there cited, we may properly

call attention to the fact that this is an equitable action for an accounting, and involves the doctrine of the proper application of funds. Plaintiffs here are creditors of C. C. Kemming, and also of the firm of Kemming & Sonksen, doing business under the name of the Denison Clothing Company. It has received funds or property of the partnership and some funds belonging to Kemming individually. In this action, brought against all the parties, defendant Sonksen asks a marshaling of the debits and credits, and insists that payments made by the partnership, or out of partnership funds, shall be applied to the firm debts, especially those payments made after notice or knowledge by plaintiff that it was receiving partnership funds, and that nothing should be credited upon the individual debts of Kemming, save payments made by him from his individual funds. That this is the rule everywhere recognized is certain from an examination of the authorities. *Vide, Hoaglin v. Henderson*, 119 Iowa, 720; *Farwell v. St. Paul Co.*, 45 Minn. 495, (48 N. W. 326, 22 Am. St. Rep. 747); *National Bank v. Brubaker*, 128 Iowa, 592; *Reyburn v. Mitchell*, 106 Mo. 365 (16 S. W. 592, 27 Am. St. Rep. 353); *Morrison v. Blodgett*, 8 N. H. 238, (29 Am. Dec. 658); *Evans v. Hawley*, 35 Iowa, 83.

In Parsons on Partnership (4th Ed.) Sections 382 and 402, it is said:

This is still more the case with questions of bankruptcy, which go into equity almost exclusively. We might expect that questions which connect partnership with bankruptcy should be, more than most others, determined on equitable principles. Hence the rule is distinctly established in equity that in bankruptcy of a partnership the joint property forms a fund appropriated to the joint creditors, and the several property of each creditor a several fund appropriated to the several creditors of each partner. And the joint creditors cannot go to the several property until the several creditors are paid in full, and there is a surplus over, by which the joint creditors may benefit. On the other hand, the several creditors cannot look to the joint fund until all the joint debts are

paid, and there is a surplus; and then the several creditors of a partner may resort to that partner's interest in that surplus. It has, however, been held that if one partner pays more than his share of the partnership debts he has, in equity, a claim on the partnership property superior to the claims of the separate creditors of the copartners.

While solvent partners cannot prove against the joint fund to the prejudice of joint creditors, because they are liable to those creditors, they may prove against the joint fund, in competition with the several creditors, to whom they are not liable. Indeed, their rights are prior to those of the several creditors; for those creditors can have the right of their debtor to the joint fund only after all claims upon it are satisfied, and, among these, the claims of the other partners. On this point, it must be the general rule, applicable to all partnerships, whether they be general or confined to a particular business or a particular transaction, and, indeed, to all joint adventures and enterprises of every kind, that they must be first settled, and the mutual claims and balances of the copartners and coadventurers be adjudged, before the divisible surplus is ascertained; and then the right of each one is only to his share of this surplus, and the creditors of each one can reach and acquire only his right. It follows, therefore, that the several creditors of each one will be postponed, so far as the joint assets go, not only to the joint creditors, but to the claims of the coadventurers for balances due from their companions, arising out of the adventure.

Applying these rules, it follows that the decree of the district court must be, and it is, *Affirmed*.

SCHOOL TOWNSHIP OF EDEN IN CARROLL COUNTY, STATE OF IOWA, Appellant, v. HENRY STEVENS, Appellee.

Bonds: LIABILITY FOR LOSS OF TOWNSHIP FUNDS. There is no liability
1 on the bond of a township treasurer providing that he shall "exercise all reasonable diligence and care in the preservation and lawful disposal of all money," for the loss of funds occurring through the failure of a bank in which they were deposited, in the absence

of a showing of negligence of the treasurer in selecting the depository.

Townships: PAYMENT OF WARRANTS BY TREASURER FROM OWN FUNDS:

2 **RECOVERY.** Where a township treasurer expecting to be reimbursed paid warrants from his individual funds, at a time when the public funds were rendered unavailable by the closing of the bank in which they were deposited, he was entitled to recover therefor from the township, when through insolvency of the bank the funds were lost.

Same: ESTOPPEL. The fact that a township treasurer rendered annual
3 statements in which funds tied up in an insolvent bank were treated as moneys on hand, did not estop him from claiming reimbursement for warrants paid from his own funds, where the facts were fully understood and it was expected that a portion of the funds in the bank would be available to the township.

Pleadings: SEPARATE COUNTS: INSUFFICIENCY OF ONE. Where there are
4 two counts of a pleading, setting up the same cause of action on slightly different legal theories, one of which presents a good cause of action, the insufficiency of the other count becomes immaterial.

Appeal from Carroll District Court.—HON. F. M. POWERS,
Judge.

SATURDAY, DECEMBER 14, 1912.

THE plaintiff is a school district. The defendant was its treasurer. This action was brought on his official bond. The defense was that the funds of the plaintiff were lost without fault of the defendant, through the failure of a bank in which they were properly deposited by the defendant in a separate and distinct account. The defendant also filed a counter-claim to recover moneys advanced by him while such treasurer in payment of valid orders and warrants drawn upon him while in such office, and paid by him in advance and in anticipation of the receipt of the public revenues for that purpose. At the close of the evidence the trial court sustained defendant's motion for a directed verdict on the main case and sustained the motion of the plaintiff for a directed

verdict on the counterclaim. Both parties appealed. Plaintiff having first appealed, it is denominated the appellant.—*Reversed and remanded*, on defendant's appeal and affirmed on plaintiff's appeal.

Reynolds & Meyers, for appellant.

Chas. C. Helmer and *E. A. Whissler*, for appellee.

EVANS, J.—The defendant became the plaintiff's treasurer in 1903, and so continued by annual elections until July, 1909. The funds of the plaintiff came into his hands from his predecessor in the form of a check on the Bank of Templeton, a going concern of repute. He deposited the check in the same bank to his account as treasurer of the plaintiff district. Such account continued as a distinct and separate account down to the date of the failure, January 27, 1908, and defendant deposited to such account all the moneys of the plaintiff which came to his hands during such period, and paid all warrants and orders by appropriate checks thereon. There is no claim of any commingling of the funds or of misappropriation of any kind. The amount deposited in such account at the time of the failure was \$2,011.93. The bank was a private bank owned by one Wilson. Wilson died on January 27, 1908, and an administrator was appointed for his estate, who, as such, took possession of the bank but did not operate the same as a bank. Wilson proved to have been insolvent, but this fact was discovered only after his death. The immediate cause of the closing of the bank was the death of Wilson, and not his supposed insolvency. The official bond of the defendant which was in force at the time of the failure was conditioned that he should perform all the duties of his office and that he should "faithfully account for all balances" of money in his hands at the termination of his term of office, and "promptly pay over" the same to his successor, and "that he will hereafter exercise all reasonable

diligence and care in the preservation and lawful disposal of all the money," etc. The plaintiff brought this action in three counts, upon this bond, and two succeeding bonds executed, respectively, July, 1908, and July, 1909. The defendant is clearly liable, if at all, on the bond in force at the time of the loss, and we need give no separate attention to the other bonds. After the death of Wilson, and while the public funds were apparently "tied up," the officers of the plaintiff issued warrants in the ordinary way, and the defendant paid the same as presented out of his own funds in anticipation of receiving later the necessary public revenues to meet the same. The amount so paid by him over and above the revenues received by him amounted at the close of his service to \$811.12, which sum he asked to recover by counterclaim. The plaintiff conceded the amount so paid out by the defendant, and tendered him full credit therefor on the original amount of the claim, and only asked to recover from the defendant the balance of \$1,200 remaining. By way of reply to the counterclaim, the plaintiff pleaded that the payment of warrants by the defendant out of his own funds was voluntary and without authority, and that the plaintiff therefore was not liable therefor. The plaintiff pleaded further, by way of estoppel, that at the annual settlements had between the defendant and the plaintiff's board of directors in July, 1908, and July, 1909, respectively, the defendant reported the full amount of money due the plaintiff as being on hand, and that his report was approved upon such representation.

I. We will give our first attention to the controversy as presented in the main case. The contention of plaintiff is that

1. BONDS: Liability for loss of township funds. the liability of the defendant for the money coming into his hands as treasurer is absolute, and that no defense of diligence is available to him. In support of this contention, reliance is had upon the following cases: *District Township v. Morton*, 37 Iowa, 550; *District Township v. Smith*, 39 Iowa, 9; *District township v. Hardinbrook*, 40 Iowa, 130.

The contention of the defendant is that, in the course pursued by him for the care of the public funds, he performed his full duty as indicated by the conditions of his bond, in that he used every diligence which could have been within the contemplation of himself or of the public corporation which he served. In support of this contention, reliance is had upon *Ross v. Hatch*, 5 Iowa, 149, and the recent case of *Hansen v. Independent District*, 155 Iowa, 264. The plaintiff contends that the holding of the court in the last two cases cited is not consistent with the holding in the *Morton*, *Smith* and *Hardinbrook* cases. We think there is force in this contention, although the court in the *Smith* case assumed to distinguish such case from the case of *Ross v. Hatch*, *supra*. It was there said that the liability of the treasurer was determined by the conditions of his bond. In the *Ross* case, the conditions of the bond bound the treasurer to "reasonable diligence and care." This provision was not contained in the bonds involved in the later cases of *Smith*, *Morton*, and *Hardinbrook*, above cited. Such provision was contained in the bond involved in the *Hanson* case, *supra*, and is contained in the bond involved herein. The present case therefore comes within the letter of the *Ross* and *Hanson* cases, *supra*, and within the distinction made in the *Smith* case, *supra*. We are not quite willing, however, to lean upon so fine a distinction, and are inclined to the view that one line of decisions ought to be followed and the other frankly overruled. The *Morton*, *Smith*, and *Hardinbrook* cases were all decided at about the same time. They were put largely upon the ground of public policy. The defense presented in one of the first two cases was that the money had been burned by accident, and the defense presented in the other was that the money had been stolen. Such defenses were in their nature comparatively easy to fabricate. The public corporation would naturally encounter great difficulty in meeting evidence produced in support of such a defense, even though fabricated. The same rule, however, was applied in the

Hardinbrook case, wherein the defense of loss by bank failure was presented. In these cited cases, emphasis was laid upon the provision of the statute requiring the treasurer to "hold" the money. It was the current judicial opinion at that time that a public treasurer could not lawfully deposit public funds in a bank, and that to do so, however innocently in a moral sense, would amount to a technical conversion. *Lowry v. Polk County*, 51 Iowa, 50 (later overruled). Since that time the ordinary methods of business and of the care and disbursement of funds have been quite revolutionized. The statute which required the treasurer to "hold" the money has been slightly amended by the elimination of the word "hold" and the substitution therefor of the word "receive." Code, Section 2768. The substitution is not very important in its effect upon the statute as a whole, but the word "receive" does not lend itself readily to the degree of emphasis which was formerly placed upon the word "hold." The doctrine that a general deposit of public funds in a bank to the separate account of the officer as such is of legal necessity a technical conversion has been repudiated. *Officer v. Officer*, 120 Iowa, 389; *Hunt v. Hopley*, 120 Iowa, 695; *Hanson v. Roush*, 139 Iowa, 58; *Brown v. Sheldon Bank*, 139 Iowa, 83.

It is held, in effect, in the foregoing cases, that the adoption of this method of caring for public funds, their identity being carefully preserved by separate and distinct accounts, as such, is not only permissible but commendable. In the light of modern methods of business, it would be difficult to specify a safer method of care and custody than is thus provided. Indeed, it might be a fair question whether, in the absence of excusing circumstances, a treasurer could properly ignore such facilities and subject public funds to the risk of loss naturally incident to a personal custody of currency. Where such course is followed, we can see no reason of public policy to be subserved by declaring for a rule of absolute liability of the treasurer, notwithstanding the exercise of all diligence

and the observance of every legal duty. We adhere, therefore, to the rule followed in *Hanson v. Independent District, supra*, and foreshadowed in the cases of *Officer v. Officer*, *Hunt v. Hopley*, *Hanson v. Roush*, and *Brown v. Sheldon Bank*, cited above, and *Ross v. Hatch, supra*. In so far as the other cases cited by appellant should appear to be inconsistent herewith, they must be deemed to be overruled to that extent. The trial court therefore rightly held against the claim of absolute liability on the part of the defendant.

As a last word, the plaintiff contends that, even though the defendant was not absolutely liable as contended for, yet the question of his diligence was one for the jury under the evidence. This point is not entirely free from difficulty. Cases might arise wherein the diligence and care of the treasurer in the selection of the depository bank might be open to question under the evidence. The evidence in this record is practically undisputed at all points. We think the most that could be claimed for the plaintiff is that there is a scintilla of evidence upon which an inference of negligence might be based. We do not think, however, that the evidence would warrant any other verdict than that the defendant was free from fault. Upon that view, therefore, we would not be warranted in remanding the case for trial upon that question.

II. We come now to the defendant's counterclaim. This was dismissed by the trial court. The first contention of the plaintiff is that the defendant made the

2. TOWNSHIPS:
payment of
warrants by
treasurer from
own funds:
recovery.

payments voluntarily and without authority. That he acted voluntarily is, of course, not questioned. He was not, however, a volunteer in an intermeddling sense. He was the treasurer. Through him alone could warrants be paid. The present funds of the district were "tied up." At first this inconvenience was expected to be quite temporary. Indeed, the fact and extent of the loss came to the officers of the plaintiff and to the defendant quite gradually. When the fact of insolvency became known, there was still the hope of partial

recovery in the form of dividends. If dividends were paid, they would be paid into the hands of the defendant. Other taxes were in course of collection and on the way into the same custody.

The defendant doubtless could have refused all warrants and compelled all holders to wait. What he did was to pay the warrants as presented out of his own funds, expecting to reimburse himself out of the public funds as soon as they should be available. He served no interest of his own thereby. The situation was anomalous. It was not covered by any statutory provision. He found himself in the breach, not of his own volition, but because of his official position. His response to it was so reasonable and so in accord with the public interest and without detriment to any right or interest of the plaintiff that he ought not to be deemed an intermeddler or a volunteer in such sense. The plaintiff got the full official benefit of the money so paid out. It would be a reproach to the law if there were no remedy available to the defendant under such circumstances. We can think of no fair reason, either legal, equitable, or moral, why he should not be reimbursed.

III. As against the counterclaim, the plaintiff pleads also an estoppel in that annual settlements were had with the defendant, in July, 1908 and 1909, respectively. In these settlements the funds "tied up" in the bank were treated as "moneys on hand," and they appeared in the defendant's account accordingly. There was neither fraud nor misunderstanding nor mistake of any kind. The facts were fully understood by all parties, and the expectation of realizing something was not abandoned. True, the settlement was binding upon the defendant. He does not claim otherwise. He disputes no item of his account as presented then. "The money on hand" was shown by the presentation of his bank book. If, as we have above held, he deposited such funds in said bank in the exercise of proper diligence, then it was "money

8. SAME: estoppel.

on hand" in a legal sense as between him and the plaintiff. The issues in this case do not involve in any manner the correctness of the settlements with the directors. They involve only the question as to whether the loss sustained shall fall upon the plaintiff or upon the defendant. That question was not involved in the settlements; nor did either party waive its contention in relation thereto by making the annual settlements required by the statute. We see nothing therefore in such settlements upon which to base a claim of estoppel.

Reliance is had by plaintiff at this point upon the cases of *Webster County v. Hutchinson*, 60 Iowa, 721 and *Boone v. Jones*, 54 Iowa, 699. These cases do not reach the point. The first case cited involved fraud and misrepresentation. The second involved the correctness of the settlement and the presumption obtaining in the absence of evidence as to whether statutory requirements were followed in the settlement.

IV. The defendant pleaded his counterclaim in two counts. These counts presented the claim upon two different legal theories. The trial court sustained a demurrer to the first count and at the close of the evidence directed a verdict against the defendant upon the second count. It is not important that we should discuss these counts or determine which presented the better theory.

We are of the opinion that the first count, to which a demurrer was sustained, presented a good cause of action. Whether the second count did likewise is quite immaterial. The difference between the two counts is not very substantial. It is our conclusion therefore that the order and judgment of the trial court should be affirmed on plaintiff's appeal and reversed on defendant's appeal. The case will therefore be remanded to the district court, with directions to enter judgment for the defendant upon his counterclaim.—*Reversed and remanded.*

EMILY M. RICE, by A. L. RICE, Administrator, and A. L. RICE, Appellants, Plaintiffs, v. WILLIAM I. RICE, MINNIE A. RICE, ELLA J. COCHRAN, O. C. COCHRAN, RACHEL C. ANDERSON, W. C. ANDERSON, Defendants and Appellees.

Real property: VALUE: EVIDENCE. Evidence that land contiguous to
1 that appraised in partition proceedings, and similar in quality, was subsequently sold for more than the land in question was appraised, was not conclusive that the appraisement was too low.

Same: PARTITION. Where simply partition of real estate in kind is
2 asked the plaintiff is not entitled to an order directing a sale and partition of the proceeds, especially where the purpose was simply to have the property offered for sale to establish a price.

Same: STIPULATION AS TO RENT: EFFECT. An agreement of the parties
3 to a partition proceeding made pending an appeal that each should have possession without rent of the land decreed to them disposed of that question, and the plaintiff was not thereafter entitled to rent from the defendant for the land decreed to him, although the stipulation did not specifically refer to such lands.

Same: APPORTIONMENT OF COSTS. Where the plaintiff in partition secured a more favorable division of the costs than he was entitled to,
4 because of an erroneous taxation of attorney's fees to the defendant, he could not complain although the defendant did not appeal.

Same: CONSTITUTIONAL LAW: DUE PROCESS. An erroneous decree in
5 partition proceedings depriving a party of a portion of his land is not necessarily a taking of property without due process, within the meaning of the constitution.

Appeal from Mahaska District Court.—HONS. B. W. PRESTON, K. E. WILCOCKSON, W. G. CLEMENTS and JOHN F. TALBOTT, Judges.

SATURDAY, DECEMBER 14, 1912.

SUIT in equity for the partition of lands. The case was before us upon a former appeal. *Rice v. Rice*, 147 Iowa, 1.

Upon that appeal the case was remanded for further proceedings. Such further proceedings being had in the district court and a final decree entered, the plaintiff again appeals therefrom.—*Affirmed.*

John F. & Wm. R. Lacey, for appellants.

W. H. Keating, for appellees Wm. I. Rice and Minnie A. Rice.

Bolton & Shangle, for appellees O. C. Cochran and Ella J. Cochran.

EVANS, J.—We quote from our former opinion the following statement of the salient facts of the case:

This is an action for the partition of real estate formerly belonging to W. H. H. Rice. It was brought by his widow, Emily M. Rice, and her son, A. L. Rice; but she has died since the case was decided in the district court, and her son and administrator, A. L. Rice, has been substituted as plaintiff. In 1889 Wm. H. H. Rice made a will, by the terms of which he devised to his wife, Emily M. Rice, one-third of all the real estate of which he might die seised in lieu of her statutory share therein. In the seventh clause of said will he bequeathed to his daughter, Mrs. Ella J. Cochran, eighty acres of land 'free from any lien or indebtedness whatever,' and by the eighth clause of said will he bequeathed to his son Wm. I. Rice another eighty acres of land 'free from any lien or incumbrance whatever.' Both of these tracts of land were specifically described, and together they constituted the tract spoken of in the record as the one hundred and fifty-nine acres lying south of the east and west road. At the time the will was made, and at the time of the testator's death, he also owned what was known as the 'homestead farm,' consisting of two hundred and forty-four acres just north of the road in question, and separated from the one hundred and fifty-nine-acre tract by such road. The tenth clause of the will was as follows: 'I hereby give and bequeath all the rest and residue of my estate, both real and

personal, not heretofore bequeathed to my said children, Mrs. Ella J. Cochran, Wm. I. Rice, and Abraham L. Rice, in equal shares, hereby intending to vest in my last named children share and share alike, all the rest and residue of my estate in fee simple absolutely not heretofore conveyed to my legatee.' Ella J. Cochran and Wm. I. Rice were children by a former wife, while Abraham L. Rice was his son by his then wife, Emily M. Rice. In the twelfth clause of the will this was said: 'My beloved son Abraham L. Rice being the only son of my wife Emily M. Rice and the heir to the estate by me hereby bequeathed to her is the reason why I make no further provision for him than I have in this my last will and testament.' No change was ever made in this will, but on the 19th of March, 1900, the testator executed and delivered to Ella J. Cochran and Wm. I. Rice separate warranty deeds, conveying to each of them the specific land that was bequeathed to them by the seventh and eighth clauses of his will. On the same day that these two conveyances were made, Ella H. Cochran and her husband conveyed by warranty deed to Wm. I. Rice the eighty that had just been conveyed to her by her father. In December, 1892, Wm. H. H. Rice executed and delivered to Wm. I. Rice a writing wherein he referred to his will of 1889 and the bequest of the eighty acres therein described to Wm. I. Rice, and agreed that, in case the purpose of his will was not so carried out as to give Wm. I. Rice the 80 devised to him, the value of the improvements placed thereon by said son was to be a claim against his estate, and it was further said therein: 'But if said W. I. Rice receive said land by bequest as contemplated and intended and provided in my said will then this agreement shall become void and of no effect within law or equity.' The wife, Emily M. Rice, did not join in the deeds from her husband to Ella J. Cochran and Wm. I. Rice, and it is conceded that she retained her statutory interest in the land at the time suit was brought; she having declined to take under the will. The widow's share in the two tracts named was set apart from the two hundred and forty-four-acre tract and included the buildings; and by taking her interest in the one hundred and fifty-nine-acre tract, the residue of which was given to A. L. and W. I. Rice and Mrs. Cochran by the will, A. L. Rice was compelled to contribute to the satisfaction of the widow's interest in the one hundred and fifty-nine-acre tract. The

appellants claim that the widow had the right to take her statutory interest in the one hundred and fifty-nine-acre tract from that tract, and that the same should be set apart to her without reference to her interest in the land north of the road; but, if that is not done, that her share of the one hundred and fifty-nine acres should be charged against only the interests of Wm. I. Rice and Ella J. Cochran in the two hundred and forty-four-acre tract.

On the former appeal it was made to appear that the district court had entered an order requiring the widow to take her full distributive share out of the two hundred and forty-four-acre tract, including therein the homestead buildings. The quantity of land so set apart for her by the referees was ninety-two acres, including the homestead. The remainder of such tract was allotted in kind equally between the three children of the deceased, W. I. Rice, Ella Cochran, and A. L. Rice. The district court also found that W. I. Rice and Ella Cochran were entitled to hold the one hundred and fifty-nine-acre tract, and that the widow was not entitled to take therefrom in kind; it being made to appear that her entire distributive share could be allotted without prejudice to her in the larger tract. On the appeal we affirmed the action of the district court in all respects save one. We held that it was error to require the widow against her preference to take her distributive share, inclusive of the homestead buildings. Upon that ground the case was reversed and remanded for further proceedings. In pursuance of such remand, and by proceedings in accord with the statute, the district court ordered a partition sale of the two hundred and forty-four-acre tract. It also ordered an appraisal by due proceedings of the one hundred and fifty-nine-acre tract. The appraisal value of the one hundred and fifty-nine-acre tract was finally fixed at \$15,105. The two hundred and forty-four-acre tract brought at referee's sale the sum of \$28,670. It was ordered that one-third of this sum be applied to the distributive share of the widow, and likewise that the further sum of \$5,035 be applied thereto

as being one-third of the appraised value of the one hundred and fifty-nine-acre tract. This made a sum total of \$14,591.67 as the full distributive share of the widow in both tracts. The balance of the sale price of the two hundred and forty-four-acre tract was divided equally among the three residuary legatees, W. I. Rice, Ella Cochran, and A. L. Rice. From the final orders and decree of the district court, the plaintiff has again appealed. The widow having died prior to the former appeal, the case has been prosecuted by A. L. Rice, her only child, as the sole beneficiary of her estate and as her administrator. The appellant has argued to some extent the merits of the case as presented on the former appeal. Such questions must be deemed concluded.

The plaintiff himself became the purchaser of the two hundred and forty-four-acre tract at the referee's sale. He does not in any manner challenge the regularity of such sale. In his notice of appeal he expressly states that he does not appeal "from so much of said decree as orders the sale of said two hundred and forty-four-acre tract."

I. The plaintiff complains of the appraisal of the one hundred and fifty-nine-acre tract, and contends that it should have been appraised at a higher valuation. The report of the appraisers fixed its value at \$90 per acre. The plaintiff excepted to such report and asked that evidence be heard thereto, and this was accordingly done. Evidence was introduced upon the question of value by both sides, and the district court found and fixed the value of the same at \$95 per acre. There was great variation in the testimony. The farm is highly improved. These improvements were put thereon by the present occupant, W. I. Rice. A part of the improvements consisted of expensive tiling which rendered tillable lands theretofore unfit for cultivation. The court was required to find the value of such tract without the improvements. There was a wide variance in the testimony. The district judge was in a better position to weigh such testimony

than we can possibly be. We think the valuation fixed was eminently fair in the light of all the evidence.

It is urged, however, that the subsequent sale of the two hundred and forty-four-acre tract and the price realized therefor was conclusive evidence that the trial court had appraised the one hundred and fifty-nine-acre tract too low. The two hundred and forty-four-acre tract brought at public sale \$117.50 per acre.

1. REAL PROP-
ERTY : value :
evidence.

This, however, included improvements worth several thousands of dollars. The two tracts were contiguous except as they were divided by a highway. The general quality of the land without improvements was similar. The absolute and exact value of real estate is not ordinarily ascertainable, either by appraisal or by actual sale. Within certain limits, the actual value is a question of judgment, and such judgment is necessarily more or less variable. Whatever the appraisal, an actual sale may realize something more or something less. While the selling price of a farm would throw light upon the value of contiguous lands, it could be by no means conclusive thereof. The district court was required to fix the appraisal upon the evidence before it at the time. Its action in so doing could not become erroneous in the light of the subsequent sale.

It is urged, however, that the trial court ought to have ordered an actual sale of the one hundred and fifty-nine-acre tract. It is sufficient to say that no such request was made

2. SAME : par-
tition.

of the district court. In the original petition filed for a partition, it was specially alleged that the plaintiff only asked for a partition in kind as to this tract. We find no ruling in the record which can furnish a basis for the plaintiff's present complaint in this regard. Furthermore the proceeding of the district court was in strict accord with our holding on the former appeal. It being found that the widow's distributive share could be assigned in one tract without prejudice to her, it became necessary to ascertain and to fix the value of the one hundred and fifty-nine-acre tract. The statutory method was followed. The plaintiff was

not entitled to have the land offered for sale simply for the purpose of fixing the price. The statutory method of appraisal operates as fairly upon one party as upon the other. If the price fixed may be a little too low, it may also be too high. Upon the record before us here, the plaintiff has no legal ground of complaint at this point.

II. After remand of the case, the plaintiff filed a supplemental petition asking for allowance of rent as against the defendants for the one hundred and fifty-nine-acre tract for the year 1908 and the subsequent years. This demand was refused by the trial court. Complaint is made of such refusal.

The decree from which the former appeal was taken was entered in 1907. The provisions of such decree have already been referred to. After such decree the parties in March, 1908, entered in to the following stipulation concerning rents:

That whereas an action in partition has been brought in the district court of Mahaska county, Iowa, which suit is not yet wholly disposed of, and whereas the parties thereto have the right of appeal to the Supreme Court, and whereas they or some of them may take such appeal, whereas the referees appointed by the court have reported in favor of setting apart specific lands to the widow and each of said parties, and whereas such report having been confirmed by the court, whereas said cause might be differently decided on appeal, and whereas it is desirable that said land should be rented or occupied pending such appeal or further court proceedings, it is therefore agreed between said parties that without prejudice to the right of appeal and without waiving any rights to apply for change or modifications of the partition in any way that each of the parties shall occupy, rent free, the particular tracts set apart to them in the said report of the referee, approved by the court; that none of the parties shall be required to account for the rents pending such appeal or further proceedings, on the tracts separately thus occupied by them during said period. This contract to stand in any event for the rental year of 1908. [Signed] A. L. Rice. Emily M. Rice. Ella J. Cochran. Wm. I. Rice.

Under this agreement the plaintiff continued in the possession of the full distributive share of ninety-two acres, including buildings set apart to the widow. The residuary devisees continued also in possession of the portions set apart to them. Wm. I. Rice continued in possession of the one hundred and fifty-nine-acre tract. The trial court held that the question of rents was adjusted by the foregoing stipulation. In this view we concur. It is urged, however, that the stipulation does not in terms refer to the one hundred and fifty-nine-acre tract. But the decree appealed from had awarded the one hundred and fifty-nine-acre tract to Wm. I. Rice and to Ella Cochran, and such provision of the decree was affirmed here. Furthermore an enlarged portion of the two hundred and forty-four-acre tract was awarded to the widow. She continued in possession of such enlarged portion until her death, and after her death the plaintiff succeeded to such possession. Upon the hearing, the plaintiff testified that the one hundred and fifty-nine-acre tract was not included in the agreement because it was "overlooked." All that is claimed now is that W. I. Rice should account to the widow for one-third of the rent. This demand ignores the fact that, under the contract referred to, the widow was put in possession, rent free, of one-third in value of all the real estate owned by her husband, including the one hundred and fifty-nine-acre tract. We think the trial court ruled properly at this point.

III. Complaint is also made of the apportionment of costs made by the district court. It appears that the trial court taxed against W. I. Rice and Ella Cochran all of the costs of appraisal of the one hundred and fifty-nine acres. Of the remaining costs, nineteen-twenty-eighths were taxed to plaintiff A. L. Rice, and nine-twenty-eighths to the other two devisees. The costs so apportioned included an attorney fee of over \$400 allowed to plaintiff's attorneys. The contention of plaintiff is that the widow's share should have been

3. SAME: stipulation as to rent: effect.

4. SAME: apportionment of costs.

charged with three-ninths of the costs, and that each of the devisees, including himself, should have been charged with two-ninths thereof. We are impressed with the propriety of this contention. Just why the trial court should have adopted this method of apportionment is not apparent from the record. The result of the apportionment as a whole, however, was to the disadvantage of the appellees. They were not chargeable with attorneys' fees for plaintiff's attorneys. *Hawk v. Day*, 148 Iowa, 47; *Hanson v. Hanson*, 149 Iowa, 82. In apportioning nine-twenty-eighths of the costs to appellees, the sum so apportioned was made to include \$402 of such attorney fee. As a result, the amount taxed to the appellees was considerably more than two-ninths of the costs properly chargeable against them. It is true the defendants have not appealed. But we cannot consider the complaint of the appellant at this point without taking into account the entire apportionment and the result thereof. We cannot, of course, award any relief to appellees from such final result. Inasmuch, however, as we do find that the appellant obtained a more favorable taxation of costs than he was entitled to, he cannot complain of the method by which such result was reached.

IV. Some other questions are argued, but they are fully covered by the opinion on the former appeal.

Appellant urges a constitutional question in that he has been deprived of his interest in the one hundred and fifty-nine-acre tract without due process of law. This proposition

doubly assumes, first, that our former holding was erroneous, and, second, that an erroneous decision is necessarily unconstitutional. We cannot accede to either assumption.

5. SAME: constitutional law: due process.

The order of the trial court is in accord with an opinion on the former appeal, and it is accordingly *Affirmed*.

HARVEY C. LEWIS, Appellee, v. THE OMAHA & COUNCIL BLUFFS
SUBURBAN RAILWAY COMPANY, Appellant.

Eminent domain: DAMAGES: RAILWAYS: MOTIVE POWER. A corporation organized as a suburban railway company for the purpose of operating a street railway between certain cities and other points, reserving to itself the right to use horse power, electricity or such other power^s as may now or hereafter prove practicable or desirable, is not precluded from propelling its cars by steam; and in the condemnation of right of way the possibility of the use of steam power may be taken into consideration in estimating the damages to the land through which it runs.

Same: RIGHT OF WAY: DAMAGES. Where a corporation, organized with authority to construct and operate a railway, acquires a right of way under the statute granting power of eminent domain, the right to use the same is perpetual, at least so long as used as a right of way; and it is proper in estimating the damages to the land through which it runs to consider what effect the use of the land taken will have upon the value of the whole tract.

Same: RAILWAYS: OPERATION: SCOPE OF POWER. It is the purpose for which a railway company is organized as expressed in the body of its charter, rather than its name, which governs the extent of its power; and while a street railway ordinarily is one authorized to use the streets of a city or town under a charter from the municipality, yet if it assumes in its articles the further power to own and operate other railways, and reserves the right to designate the power by which they shall be operated, it becomes a railway corporation in the broad sense of the term, and may determine the motive power to be used in operating its cars.

Eminent domain: NOTICE OF CONDEMNATION: SUFFICIENCY. Notice to the sheriff to condemn a right of way for a suburban and interurban line, is broad enough to confer the right upon the company to operate its cars by steam; as suburban does not necessarily mean a railway operated otherwise than by steam.

Appeal from Pottawattamie District Court.—HON. O. D.
WHEELER, Judge.

SATURDAY, DECEMBER 14, 1912.

CONDEMNATION proceeding instituted to obtain right of way for defendant's railroad over the land of plaintiff. From the assessment of damages, defendant appeals.—*Affirmed.*

Tinely & Mitchell, for appellant.

J. J. Stewart, for appellee.

WEAVER, J.—The plaintiff owns a farm of three hundred acres outside of the city of Council Bluffs, Iowa. The body of the farm is upon the low lying land which borders the Missouri river, but one corner or portion thereof rises to a higher level, and at this point it has a frontage of one hundred and eighty feet upon the public highway. Owing to the topography of these lands, the more elevated portion of which we have just spoken constitutes the most favorable and desirable site for plaintiff's buildings and improvements. At this place he has constructed a large and valuable house, and made many other improvements in harmony therewith. The house stands at a distance of about one hundred feet from the highway. Defendant has located and condemned for its right of way a strip of land along this highway, and between it and the plaintiff's buildings, thus appropriating some thirty feet of his dooryard, and making it impossible for him to reach the public road except by crossing the railway track. The jury assessed his damages at \$2,983.50. Defendant does not deny its liability for the damages thus occasioned, but contends that the amount is excessive. This result it is argued was made possible by error in the court's charge to the jury.

Many assignments of error are stated in appellant's brief, but as, generally speaking, each and all are ultimately

made to depend upon the soundness or un-

1. EMINENT DO-
MAIN: dam-
ages: railways:
motive power.

soundness of the proposition laid down by the trial court in the thirteenth paragraph of its charge to the jury, we proceed at once to a consideration of that question. The instruction reads as fol-

lows: "The defendant has condemned the strip in question for use for suburban and interurban railway purposes, but, under the law as applied to the facts in this case, the defendant would have the right to use other power than electric power in the operation of said line of railway and would have the right to use steam as a motive power, or, in other words, a locomotive, over said line; and in determining such damage you may consider that at the time of such condemnation the defendant had the right to use steam as a motive power to propel its cars over said line, and might, if it desired, use steam in the operation of said line." It is the contention of the appellant that, under the statute as well as by the limitations contained in its articles of incorporation, the company in this case cannot lawfully operate its railway by steam power, and that the instruction to the contrary in the quoted paragraph constituted error for which a reversal and new trial should be ordered.

By its articles of incorporation the defendant company declares its nature and the purposes of its organization to be among other things, "to purchase, acquire, lease, construct, maintain, and operate a street railway throughout, over, along, and upon the streets, avenues, and alleys of the city of Council Bluffs, Iowa; also from the city of Council Bluffs to Lake Manawa, a lake lying south of said city, and to and from such points within and in the vicinity of and suburban to said city of Council Bluffs as may be determined upon, whether the same shall be upon streets, avenues, alleys, or highways, or upon rights of way acquired by purchase or in the exercise of the right of eminent domain or otherwise; also to purchase, acquire, lease, construct, maintain, and operate a street railway throughout, over, along, and upon the streets, avenues, and alleys of the city of Omaha, Neb., the suburban districts known as East Omaha, Neb., and East Omaha, Iowa; also between any of the cities and districts herein named, and to and from such points within and in the vicinity of and suburban to said cities and districts, and in the operation of

all such street railways to use and employ therein horsepower and electricity or such other power or motor as may now or hereafter prove practicable or desirable, and, for the purpose of owning, leasing, constructing, maintaining, and operating such street railway, may purchase, lease, or acquire any and all necessary or desirable real and personal property privileges, franchise, grants, leases, and rights of way, and make, execute, and enjoy any contract or lease for right of way over the line or lines of any other street railway company; also in the operation of its street railway and all lines thereof to use and employ the same for the carrying of passengers, freight, express, and United States mail for hire." Other paragraphs avow the further purpose to be the acquirement of various kinds of property and the carrying on of various enterprises and lines of business, the particulars of which are not important in this connection. The notice given by the company to the sheriff for the appointment of a jury to assess plaintiff's damages in this proceeding describes the corporation as being empowered to construct and operate street railways, interurban railways, and suburban railways, and states that it has located its suburban and interurban line of railway across the land of the plaintiff.

Under our statutes, any number of persons may unite to form a corporation for carrying on any lawful business (Code, section 1607). When organized with authority to construct or operate a railway, it may exercise the powers of eminent domain for the purpose of acquiring its necessary right of way (Code section 1995). A right of way thus acquired is assumed to be perpetual so long at least as it is occupied and used for railroad purposes. *Hollingsworth v. Railway Co.*, 63 Iowa, 443; *Heskett v. Railway Co.*, 61 Iowa, 467.

In assessing damages in favor of the landowner, the jury may take into consideration any and all uses which the company may rightfully make of the land which it condemns, or of the tracks laid thereon, and the injury, annoyance, danger,

2. SAME: right
of way: dam-
ages.

and inconvenience, if any, necessarily resulting to the use, enjoyment, and value of the entire tract from which such right of way has been taken. *Henry v. Railroad Co.*, 2 Iowa, 288; *Small v. Railroad Co.*, 50 Iowa, 338; *Clayton v. Railroad Co.*, 67 Iowa, 238. The construction of street railways—that is, of railways laid upon and along the streets and highways of a city for purposes of local traffic and travel—is subject to the authorization and control of the municipalities in which they operate. Code, section 767. An interurban railway is defined by statute as a railway operated by other power than steam, and extending beyond the corporate limits of a city or town to another city or town. Code Supp. section 2033a. An interurban railway company may lay its track along and upon any public road of one hundred feet or more in width, and under certain restrictions may occupy other roads of not less than sixty feet in width. Code Supp. section 2026. Now, the distinction or peculiar privilege given to an interurban railway is this right under certain conditions to occupy and use the public roads as a right of way, and it is doubtless due to this fact that such railway is required to use some motive power other than steam.

If, therefore, in its organization the appellant herein had seen fit to incorporate with articles limiting its activities to the acquirement, construction, and operation of an interurban railway under the statute—that is, a railway operated by power other than steam—its assignment of error upon the thirteenth instruction to the jury would have to be sustained, and a new trial ordered. But its authority is not thus limited. Under the statutes governing the creation of corporation, it was entirely competent for the promoters of this enterprise to make the declared purpose of their organization broad enough to enable it to own and operate both interurban and other railways, and this we think is what they did. The nature of the corporation and the extent of its authority is neither defined nor limited by the name which it assumes, but by the power and authority with which it is clothed and the

business which it proposes to transact. So far as name is concerned, appellant does not profess to be a mere interurban railway company. It assumes the appellation of a "suburban railway company," which is by no means necessarily the same thing. We have no suburban railways as a matter of statutory classification or definition.

In the body of its articles, the company speaks of its purpose to acquire or construct and operate street railways, but here again the name is not controlling.

8. SAME: rail-
ways: opera-
tion: scope
of power.

Properly speaking, street railways under our statute are only such as are authorized to occupy and use the streets of a city or town under franchise from the municipality. If, however, a corporation organized primarily to own and operate a street railway assumes in its articles the further power to own and operate other railways, and reserves to itself the right to designate the power by which they shall be operated, we can see no good reason why in its management of such enterprises it is not a railway corporation in the broad sense of the term, and may not exercise the discretion which such corporations generally possess in choosing the motive power to be used in operating its cars. Turning to the appellant's articles of incorporation, we find that it does not limit the scope of its railway business to the city of Council Bluffs, which alone could give it the right to occupy the city streets, but makes it to include the construction, maintenance, and operation of lines "from the city of Lake Manawa as well as to and from such points within and in the vicinity of and suburban to said city as may be determined upon whether the same shall be upon streets, avenues, alleys or highways, or upon rights of way acquired by purchase or in the exercise of the right of eminent domain or otherwise." It further provides for lines to Omaha and East Omaha, Neb., and between these cities or districts and other points within and in the vicinity of and suburban thereto. Power is also expressly preserved in the operation of the railways so provided for to use and employ "horse power and

electricity or such other power or motor as may now or hereafter prove practicable or desirable." Now, while appellant could not lawfully use steam power in operating its street railways in the city of Council Bluffs, and could not lawfully assume to operate by steam power an interurban railway along the public roads outside of the city, there is still, as we view it, ample reserve power provided for in the articles of incorporation in the exercise of which it may by condemnation or purchase acquire a right of way between Council Bluffs and other cities and towns in that vicinity or suburban thereto, and on such right of way build an ordinary railroad, and operate the same in the ordinary manner. There is no statute which requires all railroads between cities and towns situated in the same general vicinity to be built or operated as interurban lines. Such roads may be of the interurban variety or of the ordinary type. If a corporation be organized with charter or articles sufficiently broad and general in terms, it may build lines of either character, and, having once constructed a road on one plan, there is nothing to prevent its abandonment for the other plan. True, if not operated as an interurban line, it could not lawfully occupy the highways, but, if such objection should arise, the corporation still has recourse to its right of eminent domain, by which it could acquire a right of way outside of the highways, as it has done in the case at bar. The farm property in question and the railway line at this point lie wholly outside of the city and for the purpose of this case the railway is not in any proper sense of the word a street railway, and, as we have already seen, its articles of incorporation do not restrict the authority or power of the corporation to make use of this road either as an interurban or ordinary railway. There was therefore no error in instructing the jury that the right of way condemned across the plaintiff's land was subject to use for the operation of a railway operated by steam power.

If we understand counsel, it is further argued that,

although the corporation may have had the legal right to condemn the right of way for the use of an ordinary railway, yet defendant in notifying the sheriff to call out a jury for the appraisal of damages limited its demand to a right of way for an interurban road, and could not lawfully thereafter operate steam propelled cars or trains thereon without a new condemnation. Assuming, without deciding, that the corporation would be found by such limitation if clearly expressed in the notice, we have to say that this notice would not call for an application of the alleged rule. The statement there is that defendant desires the right of way for its "suburban and interurban" line. We have already said that a suburban road need not necessarily mean one that is operated by power other than steam. Indeed, it is a matter of common observation by all who visit the great cities of the land that suburban roads and suburban trains are very often, if not very generally, operated by steam power. Under the proceedings herein, we are disposed to hold that defendant by said condemnation acquired the right to use the track for any and all purposes authorized by the statute, or by its articles of incorporation.

There is no reversible error in the record, and the judgment below is *Affirmed*.

E. G. CUTHBERTSON, GEORGE W. BOWEN and B. I. SALINGER,
Appellants, v. FIRST NATIONAL BANK OF CARROLL, Iowa,
and I. W. FOWLER, Receiver.

Absolute deed as a mortgage: AMOUNT SECURED: EVIDENCE. In this
1 action to have a deed declared a mortgage securing a certain sum and no more, the evidence is reviewed and it is *held*; that the defendant bank held the deed to the land as security for the payment by it of certain judgments against plaintiff, as well as other indebtedness evidenced by certain notes, and that the bank had not been reimbursed, although the judgments were apparently discharged of record; the discharge having been for the purpose of

allowing plaintiff to make a loan on the land, and not as evidence of payment in fact.

Negotiable instruments: CONSIDERATION. Where notes were given for 2 a debt then due, an agreement that they should also cover a prior and distinct indebtedness was invalid, because without consideration.

Appeal from Carroll District Court.—HON. F. M. POWERS,
Judge.

SATURDAY, DECEMBER 14, 1912.

THE facts are stated in the opinion.—*Affirmed.*

B. I. Salinger and L. H. Salinger, for appellants.

Lee & Robb, for appellees.

SHERWIN, J.—This action was brought in equity to have a deed declared a mortgage securing a certain amount and no more. The plaintiffs allege that they are the owners of certain lands, the title to which stands in the name of the defendant bank. The plaintiff E. G. Cuthbertson is the wife of D. W. Cuthbertson, and petition further alleged:

That for many years immediately preceding the 4th day of January, 1908, there was a long course of dealings between said bank and the plaintiff and her husband. Said dealings included deposits made by plaintiff and her husband in said bank and loans made by the bank to them. In the course of such dealings, the bank purchased for this plaintiff and her husband certain judgments rendered against them in this court, which judgments were liens upon the land in controversy here; the purchase of such judgments being, with the exception hereafter to be stated, done by taking an assignment of such judgments to said bank or to its said president for it; that the price paid for purchasing such judgments was at times paid by the said deposits of plaintiff and her husband, and at other times by loans made to

plaintiff and her husband by said bank; that, the method of purchase to the contrary notwithstanding, the said judgments, with the exception hereafter to be stated, were in truth and in fact bought as a method of satisfying the same; and that the purchase price paid for such judgments was either paid for by said deposits or became the debt of plaintiff and her husband to said bank, and that the lien of said respective judgments, with the exceptions stated, was thus extinguished.

It was further alleged that among the judgments rendered against said plaintiff and her husband was one in favor of the Rochester Loan & Banking Company. That a sale of the land in controversy was had thereunder, and that the land was bid in by one Graham for the sum of \$2,882.69 under an agreement between the defendant bank, the plaintiff and her husband, and Graham that the bank should furnish the money for such purchase as an advancement to the plaintiff and her husband, and that Graham should bid in the land, take a sheriff's deed thereto, and thereafter deed the same to the bank, which agreement was carried out.

Plaintiffs further alleged in their petition as follows:

The said sheriff's deed was given and taken and said deed from Graham to said bank was given and taken under an oral agreement between plaintiff and her husband and said bank and Graham that said deeds and each of them should operate only as security for what plaintiff and her husband were then or thereafter to be indebted to said bank, and neither of said deeds was given or taken with intent to divest plaintiff of title in said realty; and, with reference to the making of each deed referred to in this substituted petition, it was orally agreed by and between plaintiff and her husband, said bank, and whosoever was grantor or grantee in any of said deeds, that each and all of said deeds should in no wise operate to divest the title of this plaintiff in said realty, and that said deeds and each of them should operate only to secure to said bank whatever was or might be owing it by plaintiff and her husband. That on or about December 27, 1907, the said bank claimed that plaintiff and her husband were indebted to it in some \$15,000 as a general

balance due above deposits made by plaintiff and her husband; said sum including all advances theretofore made by said bank for plaintiff and her husband, including what had been paid to obtain the said assignments of said judgments, and the sum furnished to Graham wherewith to pay for his said bid, and including the interest due for carrying such advances. At this time there was outstanding upon said land a mortgage to one G. W. Wattles, amounting to some \$15,000, which said mortgage it became necessary to pay. Whereupon said bank, through said Culbertson, stated to plaintiff and her husband that the bank desired to avoid the appearance of being a borrower, and wished the said mortgage to be paid by a new loan, made in the name of some one other than said bank. At the same time the said Culbertson asked of plaintiff and her husband to increase said loan by approximately \$5,000, which excess should be used by the bank to meet pressing obligations, and which excess should be credited on whatsoever was owing the bank on account of the said advances. The said Culbertson also stated to plaintiff and her husband that, if plaintiff retook title for the purpose of making said renewal loan, it might jeopardize the security given the bank by the conveyance to it from Graham. Thereupon, at the solicitation of said Culbertson, plaintiff permitted one William Cuthbertson, her son, to take the deed from said bank and to place a mortgage upon said land while apparent title was in him in an amount sufficient to pay the Wattles mortgage, and approximately \$5,000. On the day the transfer so consented to was made to William Cuthbertson, to wit, December 27, 1907, the said William Cuthbertson and wife made two mortgages aggregating \$20,000 to said Wattles. And, on the same day still, the said William Cuthbertson and his wife deeded back to said bank the land in controversy herein, and said excess or addition to the said \$15,000 mortgage was delivered to said bank to be a credit on said account of plaintiff and her husband. That on the 4th day of January, 1908, there was a complete oral settlement of all matters then outstanding between the defendant bank and plaintiff and her husband, in pursuance of which settlement the plaintiff and her husband delivered to said bank their certain promissory notes for \$15,000, more particularly described in the prayer herein. in full satisfaction of all matters between them, which said notes were accepted by said bank in full satisfaction and

payment of any and all debts then claimed to be due said bank from plaintiff or her husband. That, as a part of said settlement, it was orally agreed that the deed from William Cuthbertson and wife aforesaid should stand as security for the payment of said agreed balance due of \$15,000, and that plaintiff avers that the said notes represented, and do represent, all due from plaintiff or her husband, or either of them, to said bank.

The plaintiffs prayed that the deed in question be declared a mortgage to secure the \$15,000 represented by the notes of January 1, 1908, and that the bank be compelled to satisfy of record all judgments held by it which are liens upon the premises. In its answer and cross-petition the defendant admitted that E. G. Cuthbertson and her husband, D. W. Cuthbertson, were the owners of the land in controversy prior to March 16, 1903, and that it was conveyed by Graham to the bank as security to said bank for whatever sum the plaintiff E. G. Cuthbertson and her husband were then, or might thereafter become, indebted to said bank. It was alleged that the sale of the land to Graham, under the judgment in favor of the Rochester Loan & Banking Company, was subject to other existing prior liens on said land, and that, after the bank acquired the title thereto, it was compelled, in order to protect its security, to purchase the judgments which were prior liens on the land. The defendant further alleged that the land was to be held as security for the sums so paid in addition to the sum of \$15,000 represented by the notes of January 1, 1908. The bank further alleged that to protect its security it was compelled to pay interest on a prior mortgage on the land, and also taxes thereon. The alleged settlement was denied. On the issues thus joined, the case was tried to a referee, who reported his findings of fact and conclusion of law to the district court, where they were approved; the court finding that the Cuthbertsons were indebted to the bank in the sum of \$43,049.99, including interest to January 1, 1909. This

amount included all sums due the bank. The plaintiffs appeal. There is no question as to the amount due the bank on the five \$3,000 notes executed to the bank on January 1, 1908, nor as to the amount due it for the advancement of \$2,882.69, to enable Graham to buy in the land at the sale under the Rochester Loan & Banking Company judgment. No serious question is made as to the sum due the bank for interest paid on the Wattles mortgage of \$20,000, which was prior to the mortgage deed held by the bank, nor as to the amount of taxes paid by the bank to protect its security.

The real controversy in this case centers around two fact questions: First, did the bank furnish the money to

1. ABSOLUTE
DEED AS A
MORTGAGE:
amount se-
cured: evi-
dence.

procure assignments of the judgments in question? and, second, if it did, was there a satisfaction of the bank's claim therefor on the 1st of January, 1908, when the five \$3,000 notes were given to the bank? The last of these two propositions is the more serious one of the two. The dates of these several transactions are material, and, at the risk of repetition, we set them out together. The judgments involved in this controversy, with two exceptions, were rendered in 1898, and assignments thereof were made to the bank or to W. L. Culbertson on dates ranging from April 22, 1899, to January 31, 1903. Of the other judgments, one was rendered in June, 1899, and the other in December, 1907, and one was assigned to the bank in 1902, and the other one was first assigned to W. L. Culbertson and later to the bank by his executrix. The title to the land was taken by Graham and by the bank from him in 1903. As we understand the record, the original Wattles mortgage was a lien prior to the lien of any of these judgments, and, when it became due, it was necessary to make provision for its payment, and this was done in December, 1907, under agreement as follows: The bank conveyed to William Cuthbertson, a son of the plaintiff E. G. Cuthbertson, and he executed two new mortgages to Wattles in the aggregate sum of \$20,000, and on the same day deeded the

land back to the bank. It was January 1, 1908, that the five \$3,000 notes were given to the bank. The judgments that were rendered against the Cuthbertsons October 3, 1898, aggregating nearly \$14,000, were satisfied of record December, 27, 1907, by the bank through W. L. Culbertson, its president, and by W. L. Culbertson individually. This was on the same day that the two mortgages on the land were given to Wattles, and the record shows that satisfaction of the judgments was then entered for the purpose of enabling the Cuthbertsons to make this new loan. We have given the evidence in this case very careful consideration, and we are fully satisfied that all of the judgments in question were taken up by the bank with its own money, under an agreement with the Cuthbertsons, husband and wife, that the bank should do so and hold the land as security therefor. Appellants make many technical objections to a great deal of the evidence offered by appellees, but we think the appellants' admissions in pleading and as witnesses, together with other evidence of appellees which is clearly competent and entitled to weight, establish, without serious question, the liability of the Cuthbertsons, in the first instance, for the sum so advanced by the bank. The assignment of these judgments to the bank, and the satisfaction of the October, 1898, judgments on the very day that the new mortgages to Wattles were executed by William Cuthbertson for the benefit of his parents, is in itself a circumstance of great weight, and, together with the other facts either admitted or proven, is very nearly conclusive on this branch of the case.

As we have before indicated, the one difficult question in this case is whether there was a settlement on the 1st of January, 1908, which included the money paid on these judgments by the bank. It is undisputed that at this time the bank held notes of the Cuthbertsons for the full amount represented by the five \$3,000 notes, and that said five notes represented renewals simply of previous notes. And it is practically undisputed that renewals of notes and actual

loans had been made from time to time from 1897. The Cuthbertsons did not attempt to show that any of the money paid by the bank on these judgments had been included in any particular one of the prior notes that had been renewed from time to time, and the evidence of the defendant is practically conclusive that no part of such money could have been included therein. The judgments paid by the bank aggregated over \$20,000, and it was conceded by appellants that there was other large indebtedness to the bank during the years covered by their transactions. The contention of the plaintiff E. G. Cuthbertson and her husband is that, when the five \$3,000 notes were given to W. L. Culbertson for the bank, he was asked whether they included judgments and everything else, and that he answered "Yes." So far as the plaintiffs' evidence goes, that was all there was to the settlement of the amount due on account of the judgments. It is not satisfactory in itself. It is improbable that a claim of over \$20,000 would be so lightly disposed of, or so little discussed, and we are united in the conclusion that there was never a settlement of the judgments.

Moreover, if such an agreement as appellants claim had been made, it would be invalid because
2. **NEGOTIABLE INSTRUMENTS:** without consideration. *Marshal v. Bullard*,
consideration. 114 Iowa, 462.

The bank having taken assignments of these judgments and having released them on the record for the purpose only of enabling the appellants to make the Wattles loan, it is manifest that it is entitled to the interest provided for in the judgments, and this was allowed, as we understand the matter.

No issue is raised in the pleadings as to the validity of the receivers' appointment, and hence no such question is before us. An amendment to the abstract shows that an affidavit for attorney's fees was filed by appellees, and hence such fee was properly allowed. The judgment is *affirmed*.

NICHOLAS RAGETH, Appellant, v. JOHN BOLINGER,
Administrator, Appellee.

Contracts: MERGER. The oral agreement of a decedent to convey certain land in consideration of services rendered is merged in and satisfied by a subsequent conveyance of his land to claimant, even though the grantee paid full consideration under the written contract.

Appeal from Harrison District Court.—HON. O. D. WHEELER,
Judge.

SATURDAY, DECEMBER 14, 1912.

THIS is a claim against the estate of a decedent for labor and service under an alleged agreement for compensation, "to consist of not less than forty acres of land in Harrison county." At the close of plaintiff's evidence the trial court directed a verdict for the defendant. Plaintiff appeals.—*Affirmed.*

C. W. Kellogg, for appellant.

Tinley & Mitchell, for appellee.

EVANS, J.—The plaintiff was the stepson of the decedent, Jacob Rohner. He was ten years old at the time of his mother's marriage to the decedent in April, 1883. He came into the family with his mother, and so continued until he had attained his majority. His claim as filed with the administrator was stated as follows: "That during the time from April, 1883, to the spring of 1894, the deceased, in his lifetime, became indebted to claimant as follows: That claimant

worked for deceased on his farm in Harrison county during those years, and received nothing for his services. That the deceased promised orally to reimburse claimant by leaving him part of his estate at the time of his decease, the said estate to be left to consist of not less than forty acres of land in Harrison county. That the deceased died in September, 1909, without having provided for claimant as above agreed. That there is due claimant from the said estate \$4,000, or the equivalent of forty acres of land, with interest thereon at 6 per cent per annum from the 4th day of September."

The plaintiff became of age in 1894. The decedent was a farmer, and had three forty-acre tracts of land in Harrison county, situated, respectively, in certain sections 3, 4, and 33. The tracts in sections 4 and 33 were contiguous. The other tract was separated from these two. One of the tracts was acquired since the plaintiff became a member of decedent's family; the other two being owned by decedent prior to such time. The record does not disclose which tract was last acquired. The following is the substance of the testimony introduced by plaintiff in support of his claim:

Frank Boehler testified: "Well, we got to talking about the farm, and about his leaving the farm. He said he sold it to his stepson. Through the conversation I asked him what wages he ever paid to his stepson before he sold him the farm. He says: 'He never had any stipulated wages. I never paid him wages.' He said he never paid him wages, for he was to give him some land, either whenever he died or not. I can't remember now the very words he said; that is the saying of them. That is the substance of it. He said: 'I wish that boy would get married, so I could make a will; but I won't make no will so long as he ain't married, as long as he ain't got any children, for I don't want any of the property to go over to his folks. Whenever he has got a wife and children, I will know what I have got to do then.' He said: 'I told Nick I would give him forty acres of land, the forty lying upon the hill.' "

Wohlers testified: "A. When I seen Mr. Rohner down town, he told me that Nick—he was there the day before in his house—and he told me that Nick he had been pretty good on the farm, and he wouldn't beat him, and that he was going to do what was right, and Nick he knows about what he gets. What he got out of him was for his mother."

Mrs. Wohlers testified: "Well, he said that people had told him that he did not have to give Nick anything, and he said he went to several reliable parties, and they said he did not have to give Nick anything; but he said he was going to do what was right by Nick, and he wouldn't beat him out of anything for the sake of his mother."

It is manifest from the foregoing that the evidence on behalf of the plaintiff was very slender indeed. Statements attributed to the decedent are quite consistent with the absence of obligation on his part, and yet with the desire and intent to do something voluntarily. If it can be said that the evidence was sufficient to go to the jury in support of a binding promise, it was a promise to give to him forty acres of his land. The importance of this conclusion appears from other features of the evidence not quoted above. In 1899 the plaintiff and the decedent entered into a written contract whereby the decedent agreed to convey to the plaintiff *all* his land, consisting of the three forty-acre tracts, and whereby the plaintiff agreed to pay the decedent in installments on long time the sum of \$3,200. Later in 1906 the decedent executed to the plaintiff a warranty deed of all such land, and the plaintiff executed to the decedent a note and mortgage of \$2,165. Other notes appear also to have been executed, which are not further explained in the record. The decedent died in 1909. It is manifest that, if there was an oral agreement or understanding between plaintiff and decedent prior to 1899, it was necessarily merged in the written contract, which included the very subject-matter of the alleged oral contract.

It is urged on behalf of the plaintiff that there was no

breach of the oral contract until the death of the decedent, and that the breach occurred by the failure to make provision for plaintiff by will. It is also urged that the execution of the written contract and conveyance did not terminate the obligation of the decedent to render compensation to plaintiff for his services during his minority. It is also urged that the decedent recognized his oral obligation as continuing notwithstanding the written contract, and that some of the alleged admissions above quoted occurred after the execution of the written contract. We do not think the testimony will fairly bear this argument. The decedent may have intended to do more for the plaintiff than he did. But there is nothing in the conversations quoted to indicate that he had bound himself to do so. If the evidence was sufficient to show a promise to convey forty acres of land in compensation for the work, such promise was literally fulfilled by the conveyance subsequently made. It was none the less fulfilled because other transactions between the same parties were added to it. If the oral contract was binding, the subsequent written contract was clearly so.

It is urged in argument by appellant that the plaintiff paid full value under the written contract. It does not appear from the record whether this be so or not. If it were so, it would hardly aid the plaintiff. If the oral contract was originally binding upon the decedent, the subsequent written contract was thereafter equally binding upon the plaintiff. The appellant urges that his claim is not for forty acres of land, but for compensation for his work, and that the evidence shows that the decedent intended to compensate him. But, if plaintiff's evidence proves anything, it proves that the form of compensation was specified. From the nature of the case it could not have been ignored or lost sight of when the parties entered into the written contract. If the oral contract was sufficient to confer upon the plaintiff an equitable interest in any part of the decedent's land, then the conveyance to plaintiff by decedent by warranty deed of all his land

was a merger of estates. This legal proposition is not disputed. See *Archer v. Jacobs*, 125 Iowa, 468; *James v. Newman*, 147 Iowa, 574. The decedent could never thereafter convey to him any greater interest in any of such land than was conveyed to him by the warranty deed.

We think the trial court properly directed the verdict, and such order is accordingly *Affirmed*.

MINNIE M. BAKER v. BLANCHE A. CLOWSER, et al., and
LEANDER W. CALHOON, et al., Appellants.

Descent of property: INHERITANCE FROM ADOPTED CHILD: STATUTES.

- 1 Under the general inheritance statutes the heirs of an adopting parent, upon the death of an adopted child unmarried and without issue, would not inherit the property of such child, but the same would pass to the natural parents of the child. And even though by a recent statute, attempting to fix the relation between adopting parent and adopted child, and in effect a modification to some extent of the inheritance law, it should be held that an adopting parent may inherit from the adopted child, it does not provide that the heirs of such parent are heirs of such child; and the exception to the general statute will be strictly construed and given effect only to the extent of its positive provisions.

Co-tenants: OUSTER. A co-tenant in possession, basing his claim to the
2 entire property solely upon improvements made upon the property, cannot invoke the statute of limitations against another co-tenant who did not know that the improvements were made under a hostile claim.

Sherwin and Evans, JJ., dissenting.

Appeal from Page District Court.—HON. A. B. THORNELL,
Judge.

SATURDAY, DECEMBER 14, 1912.

IN an action for partition of certain real property between the widow and heirs of W. S. Baker, deceased, who was alleged

to have died seised of such property, the court was asked to decree that defendants Leander W. Calhoon and his wife, Polly Calhoon, had no interest in said property. By way of resistance to the relief thus asked, Leander W. Calhoon alleged that as the father of one Hattie Calhoon, deceased, who died seised of an interest in the property as coheir by adoption with W. S. Baker of David P. Baker, father of said W. S. Baker, he acquired title to one-half of such interest in the property of David P. Baker. The court held that Leander W. Calhoon acquired no interest in the property through his daughter, Hattie Calhoon, by reason of her adoption by David P. Baker, and from such decree, Leander W. Calhoon and his wife, Polly Calhoon, appeal.—*Reversed*.

W. E. Gray and M. W. Frick, for appellants.

H. H. Scott and Parslow & Peters, for appellee.

McCLAIN, C. J.—As between the plaintiff who is the widow of W. S. Baker, and the defendants (other than Leander W. Calhoon and his wife), who are alleged to have interests in the property in controversy as the heirs of W. S. Baker, no issue is presented on this record. The sole question for determination is whether Leander W. Calhoon has an interest therein, growing out of facts which will now be stated only so far as they are necessary to show what the issue decided by the trial court really was.

In 1885, David P. Baker died seised of the land in controversy. Prior to his death, he adopted as his child, by articles properly executed and filed, one Hattie Calhoon, issue of a marriage between his daughter Frances and the defendant Leander W. Calhoon, who in the meantime had been divorced from his wife, Frances, and had gone to another state to reside, and had there remarried. David P. Baker left surviving him five children and also his adopted child, Hattie Calhoon, and it is agreed that this adopted child be-

came an owner, by virtue of her adoptive relationship to the deceased, of an one-sixth interest in the property in controversy. By various conveyances, W. S. Baker, one of the children of David P. Baker, acquired the interests of his natural brothers and sisters and died seised of the land in controversy, subject only to the interest therein, if any, of Leander W. Calhoon, as father of Hattie Calhoon, who had died in the meantime. The mother of Hattie Calhoon also survived her and is still living (divorced, as already indicated, from the father); but her interest, if any, in the estate of her daughter, has passed to W. S. Baker by conveyance. The plaintiff, as widow, and the other defendants, as heirs through W. S. Baker, now claim the property under W. S. Baker, and seek to quiet the title thereto as against any claim of Leander W. Calhoon, contending: First, that said Calhoon acquired no interest by reason of his relationship to his daughter Hattie Calhoon; and, second, that if any interest ever passed to him by virtue of such relationship, it is now barred by the adverse possession of W. S. Baker and those claiming under him.

I. The first question presented for our determination under this record is whether on the death of Hattie Calhoon, seised of an one-sixth interest in the property in controversy

by virtue of her adoption by David P. Baker, the father of W. S. Baker, under whom the other parties to the case claim title, the interest of said Hattie Calhoon passed to her

natural father and mother in equal shares, or whether it passed to the other heirs of David P. Baker, her adopted father. Or, to state the question more concretely, it is this: On the death of an adopted child, dying without issue and unmarried, does the property inherited by such child from the adopting parent, who has in the meantime died, pass to the natural parents of such adopted child?

By the statutory provisions in this state regulating the descent of real property, which provisions contain no specific reference to cases of adoption, the surviving parents of one

1. DESCENT OF
PROPERTY: In-
heritance from
adopted child:
statutes.

who dies without issue and unmarried become vested in equal shares with all the real property of which their child dies seised; and Hattie Calhoon did, in fact, died seised of an one-sixth undivided interest in the property in controversy. See section 2455 of the Code of 1873, which was in force at the time of the death of Hattie Calhoon, and remains unchanged in effect in the present Code as section 3379. Therefore, unless the statutory provisions with reference to adoption prevent this result, Leander W. Calhoon is vested with an one-half undivided interest in the one-sixth undivided interest in the property in controversy of which Hattie Calhoon died seised.

The statutory provisions as to adoption which were in force when the adoption took place, and at the death of Hattie Calhoon, declared that any person competent to make a will might adopt the child of another, "conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting in lawful wedlock," and that upon the execution, acknowledgment, and filing for record of the instrument of adoption, "the rights, duties, and relations between the parent and child by adoption, shall, thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth." See Code of 1873, sections 2307, 2310.

Under these statutory provisions, this court expressly refused to decide, in *Burger v. Frakes*, 67 Iowa, 460, 469, whether, on the death of an adopted child, the adopting parents surviving became the heirs of such child under the general statutes of inheritance, leaving it an open question whether the adopting parents or the natural parents inherit from the adopted child whom they survive. In *Chehak v. Battles*, 133 Iowa, 107, the court treated the question of the right of inheritance from the adopted child, as between the surviving foster parents and natural parents, as still open, with the suggestion that the authorities in other states are not harmonious, although in the meantime the Code of 1897

had been enacted, in section 3253 of which the provisions of section 2310 of the Code of 1873 had been substantially incorporated, with the omission, however, of any express reference to the right of inheritance. It is probable that the omission of specific reference to rights of inheritance as between the adopting parent and the adopted child indicated no intention to modify the statutory provision as it previously stood, for the Code Commissioners declare, in effect, that no change in the law was intended. See Code Commissioners' Report, 1896, page 93.

But it is contended for appellants that there has been recently a legislative interpretation of the previously existing statutory law on this subject by the enactment, in 1902, of a statute amending Code, section 3253, by adding the provision that, as between the adopting parent and adopted child, the right of inheritance from each other shall be the same as between natural parent and child (29 G. A., c. 132), and another statute providing for an inheritance on the part of the parents by adoption in accordance with the general statutory provision regulating inheritance as between a parent and a child dying without issue, with the added provision that, if no heirs are found in the line of the adopting parents, the property of the deceased shall go to the natural parents, and, in case they have died, then in their line of descent (29 G. A., c. 136). There is certainly some force in this argument. If, under the existing statutory provisions, the property of an adopted child would go to its adopting parents or, in case they were already deceased, to their heirs to the exclusion of the natural parents and their heirs, then there was no occasion for the additional legislation to effect the purpose accomplished, save in so far as it was desired to provide for an inheritance by the natural parents or their heirs in the event that no heirs in the line by adoption were found. However this may be, the fact that the Legislature saw fit, in 1902, to expressly provide for the descent of the property of the adopted child in the adopting line, does not constitute a legis-

lative declaration that the previous statute on the subject, which by its terms declared only the relations between the adopting parent and the adopted child, had that effect. It is plainly not competent for the Legislature to prescribe or indicate the construction of a previous statute under which rights have already vested.

In the absence, therefore, of any controlling construction as to the statute in question so far as it relates to the rights of the heirs of David P. Baker to inherit the interest in his estate which passed to Hattie Calhoon by virtue of her adoption, we look to the decisions in other states relating to the construction of similar statutes so far as they bear on the question, and we find the weight of authority to be to this effect: That the general statutes of inheritance are modified and set aside by statutes regulating the effect of adoption only so far as there is some specific provision in the statutes for adoption inconsistent with the application, in such cases, of the general inheritance statutes. *Reinders v. Koppelman*, 68 Mo. 482 (30 Am. Rep. 802); *Upson v. Noble*, 35 Ohio St. 655; *Hole v. Robbins*, 53 Wis. 514 (10 N. W. 617); *Barnhizel v. Ferrell*, 47 Ind. 335; *Clarkson v. Hatton*, 143 Mo. 47 (44 S. W. 761, 39 L. R. A. 748, 65 Am. St. Rep. 635); *Keegan v. Geraghty*, 101 Ill. 26; *White v. Dotter*, 73 Ark. 130 (83 S. W. 1052).

To apply such a rule in the construction of our own statutes is not in violation of the requirement of our Code (section 3446) that its provisions "shall be liberally construed with a view to promote its objects." That language is used only to negative the rule of the common law that statutes in derogation thereof are to be strictly construed, and not with reference to the rule of construction to be applied in determining the extent of a statutory exception to a general statutory provision. Of course, the exception goes no further than the language used in providing for it will fairly warrant, and it must be presumed that, beyond the scope of the exception thus provided for, the general statutory provision shall apply.

From our own decisions some illustrations pertinent to the general subject-matter may be gathered. In the case of *Estate of Sunderland*, 60 Iowa, 732, it was held that under an adoption in another state by which, under the statutes of that state, the adopted child became entitled to inherit from the adopting parents, such child was not entitled to inherit through such adopting parents by right of representation. And in *Wagner v. Varner*, 50 Iowa, 532, we held that a child by adoption does not cease to be the child of the natural parent and entitled to inherit from such parent, the necessary implication being that the fact of adoption does not deprive the natural parent of the right to inherit from such child. In that case the court suggests that "heirship is not a natural but a statutory right, arbitrary and general, and therefore exceptional cases of apparent hardship or inequality must occasionally occur."

The only cases cited for appellee which seem to run counter to the weight of authority, as above indicated, are those of *Humphries v. Davis*, 100 Ind. 274 (50 Am. Rep. 788), and *Paul v. Davis*, 100 Ind. 422, in which it is held that the property inherited by an adopted child from the adopting parent does not, on the death of such child, pass to its natural parents, but goes to the persons who would have inherited it had the adopted child been the natural child of the adopting parents. That is to say, so far at least as property inherited from the adopted parent is concerned, the rules of inheritance are exactly the same as those which apply to a natural child. But our statute does not so provide, and to give it such construction would be pure judicial legislation. As indicated in the case of *Estate of Sunderland*, *supra*, the adopting child does not become in law the natural child of the adopting parent for all purposes unless the statute so provides, and the statute cannot be enlarged or extended in its scope beyond the legal effect of the language used. The theory of the two Indiana cases, last above cited, is that, for the purpose of effecting natural justice, the adopted child

may be treated as having a different status with reference to property inherited from the adopting parents than that which attaches to it with reference to property inherited from the natural parents; for the court apparently realizes the absurdity of holding that property inherited from the natural parent (such right of inheritance continuing to exist under the general statute notwithstanding the provisions of the statute as to adoption) shall go, on the death of the child, to the adopting parents or their heirs, rather than to the heirs in the natural line. The Indiana court attempts to sustain this anomalous distinction between property inherited from the adopted parent and that inherited from the natural parent by reference to rules of the civil law. Without discussing the peculiar relation arising by adoption under the civil law, it is sufficient to say that the relation arising by adoption is defined and determined by our own statutes, and it cannot be assumed that the Legislature intended that they should be construed in accordance with civil law rules. In *Reinders v. Koppelman*, *supra*, the Supreme Court of Missouri discusses the civil law status arising by adoption, and points out that the statutes of that state, quite similar in their general provisions to those of this state, describe the rights arising by adoption as quite different from those which result from adoption under the civil law.

The attempt to introduce a peculiar rule of descent for property acquired by the adopted child from the adopting parents might seem, in particular cases, to be more in accordance with our general notions of natural justice. Such rule would, however, not only be without statutory authority, but in many cases would unnecessarily lead to the greatest confusion in its application. Suppose the adopted child should for many years outlive its adopting parent and also its natural parent, having by inheritance derived property from each, and having also accumulated property of its own. How could any court undertake to determine what portion of the estate finally left by such child should go to heirs in the line of the

adopting parent and what portion should go to heirs in the natural line? Suffice it to say that our statutes fix a general rule of inheritance, and that the statutory provisions as to adoption modify that general rule only in specific respects. Even if we should hold that the adopting parent is by statute the heir to the adopted child dying without issue or surviving spouse, still we would find no authority in the statute for holding that the heirs of the adopting parent are the heirs of the deceased adopted child. The statute in its broadest interpretation only attempts to fix the relation between the adopted child and the adopting parent; it does not attempt to indicate who are to be regarded as the heirs of the adopted child if the adopting parent is deceased. Heirship, under such circumstances, must be determined from the general statutory provisions as to inheritance.

II. The contention for appellees that W. S. Baker, under whom they claim, held the property in controversy adversely to any right of appellants derived from their daughter Hattie Calhoon, and that such adverse possession has continued in appellees so that the rights of appellants are barred by the statute of limitations, is not supported by the record. It is conceded that, when W. S. Baker first took possession of the land in controversy as one of the heirs of David P. Baker, he was a tenant in common with the other heirs, including Hattie Calhoon, as heir by adoption, and that she then was entitled to an one-sixth interest in the property. The only claim of an assertion of hostility to her title and that derived by her natural father from her on her death is based upon improvements made on the land by W. S. Baker during his lifetime. Now it appears from the testimony of plaintiff herself (widow of W. S. Baker) that her husband first went into possession of the land in controversy as tenant of his father, and that he continued to occupy the land as tenant after his father's death and until the death of his mother, and that the improvements relied upon were made before his mother's death. However this may be, there

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is no evidence that Leander W. Calhoon, after the death of his daughter Hattie, had any knowledge of the making of any improvements under an assertion by W. S. Baker of hostile title to the share of Hattie and it is admitted that, so long as Hattie lived, her right to an interest in the property was not tolled by any hostile possession. So far as we can discover in the record, there was no public and notorious assertion of right to the entire property on the part of W. S. Baker to the exclusion of the interest of Hattie until, after having acquired by conveyances the interest of his other coheirs, he executed a mortgage on the premises in 1904, which was then recorded. Conceding that the recording of this mortgage constituted notice to Leander W. Calhoon of the assertion of a hostile title so far as his interest in the property was concerned, it is sufficient to say that ten years from such assertion of a hostile title had not elapsed when this action was brought and Leander W. Calhoon interposed his claim of an interest by inheritance from his daughter. Counsel for appellees rely entirely upon the case of *Hanson v. Gallagher*, 154 Iowa, 192, in support of their contention; but reference to that case shows that it in no way supports the claim made for it. It was there expressly held that possession was not taken as cotenant, but under an absolute and exclusive claim of right.

The decision of the trial court is therefore *Reversed*.

SHERWIN and EVANS, JJ., dissent.

JOSEPH DEPUGH, Appellee, v. FRED BROWN, Appellant.

Mortgages: NEGLIGENCE IN EXECUTION: EVIDENCE. Where the evidence tended to show that a broker, in the sale of land to plaintiff, agreed to procure for him a loan at a specified rate of interest and to pay any excess rate; that he directed plaintiff to another who made the loan in two notes and mortgages, one bearing the agreed

rate and the other a higher rate, and that plaintiff did not read the notes and mortgages, but signed the same after the lender had read to him the mortgage bearing the lower rate. *Held*, that the question of whether plaintiff's negligence in signing the papers was such as to preclude his enforcement of the agreement with the broker was for the jury.

Damages: INSTRUCTION AS TO AMOUNT OF RECOVERY. Where there was
2 no question as to the amount of plaintiff's recovery, and there was nothing for the jury to do in that regard except to make the computation, it was proper for the court to advise the jury of the amount, in case they found the plaintiff entitled to recover anything.

Limitation of actions: Where a broker agreed with the purchaser of
3 land to procure a loan for him at a stated rate of interest and to pay any sum in excess of that rate, the statute of limitations would not commence to run against a claim for the excess until it was paid by the purchaser.

Appeal from Harrison District Court.—HON. O. D. WHEELER,
Judge.

SATURDAY, DECEMBER 14, 1912.

ACTION to recover excess interest upon a loan which plaintiff was compelled to pay; defendant agreeing to pay all over 5 per cent. that plaintiff was compelled to pay. Defendant denied the allegations of the petition, pleaded the statute of limitations, and also, in substance, that plaintiff was not compelled to pay the amount of interest which he did, and that if he, plaintiff, had notified defendant, he, defendant, could have procured a loan for a much lower rate. On these issues the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed*.

C. W. Kellogg, for appellant.

S. H. Cochran, for appellee.

DEEMER, J.—Defendant and one Ellis were real estate agents, and as agents for a landowner named Nelson they sold his, Nelson's farm to plaintiff on or about March 1, 1906. It is agreed that plaintiff said he could not pay all cash for the farm, and would have to borrow some money thereon, and it is claimed by plaintiff that defendants then agreed that they would procure a loan for him at 5 per cent., and that, if he was obliged to pay more, they would pay him the difference.

Defendant denied that this was the nature of the contract, but the jury found against defendant on this proposition, and the verdict must in view of the conflict in the testimony be treated as a verity. Defendants deny that they agreed to furnish the money at 5 per cent., but stated that they could get a first mortgage at 5 per cent., and had made arrangements with one Burke at Missouri Valley for a second mortgage at 6 per cent. After the contract of sale had been signed, plaintiff went to Missouri Valley, and saw Burke, and on March 12, 1906, signed two mortgages securing two separate notes, one made payable to H. W. Binder and the other to Burke. The note to Binder bore 5 per cent., and the one to Burke 8 per cent. interest. Plaintiff signed the notes without reading, and did not know that the second bore 8 per cent. interest until some time afterwards, nor did he inform defendant of that fact until about a year afterward.

Plaintiff explains the circumstances attending the signing of the notes as follows:

At the time the two mortgages were made, the first one was read over to me by Mr. Burke. The second mortgage was not read over to me. . . . I discovered for the first time that the second mortgage provided for 8 per cent. interest the year after it was made, when I went to pay the interest. At that time I went to see Mr. Brown, and I said to him that Mr. Burke said that that mortgage called for 8 per cent. Brown says: 'It is no such damn thing.' I told him that was what he charged against me, and I would not pay it. Mr. Brown said he would see about it. I spoke to Mr. Brown

1. MORTGAGES:
negligence in
execution:
evidence.

again when I went to pay the interest again next year. I wanted him to straighten it out, but he didn't seem to think he would. I had to go off and leave it that way. * * * When I went to Missouri Valley, Billy Burke drew up the papers in his office. I went to Mr. Brown, and told him I was ready to close the deal. He says: 'Well, the papers are over to Mr. Burke's bank. We will have to go over there.' I do not recollect he said anything to Mr. Burke in my presence, but he told me, he says: 'I have got Mr. Burke to do this writing. He is a better hand than I am. I have got him to do this.' He said Mr. Burke would fix out the papers. Mr. Burke read the first mortgage from Mr. Binder. I knew I was giving the first mortgage to Mr. Binder. I did not say anything about the second mortgage, and he did not read it over, and he did not read over the note to me. I knew how much the second mortgage was, how much it called for, but I did not know what rate of interest. He told me how much the first mortgage was and read that over. I signed the second mortgage and the note with it without knowing what it was, except that it was a second mortgage for that amount. . . . At the time this mortgage (Exhibit 2) was signed, I went to Mr. Brown, and he said he got Mr. Burke to write it up, he was a better hand at the business. Mr. Brown went with me to the bank, and went through the bank to Mr. Withrow's office, and went out. He was not there when the papers were being signed. I did not see him about this again for a year. . . . I did not read the contract over. I can read a little. I can read newspapers sometimes. (Witness shown Exhibit 1.) Yes; I can see that signature on that contract. It is my signature. I can see the signature upon deed Exhibit 2. That is my signature. At the time this mortgage (Exhibit 2) was signed I did not get Mr. Burke to read it to me.

Burke testified as follows: "Mr. Brown called on me before this farm was sold in regard to securing this money for Mr. Depugh."

Defendant testified on the same subject as follows: "We told him (plaintiff) we could make the first loan at 5 per cent. straight and the second at 6 per cent. Said that Mr. Burke would make the second loan at 6 per cent. He said he

would take the farm if he could get it at \$67.50 an acre and pay 5 per cent. on the first and 6 per cent. on the second loan. There was nothing said about how much of a first mortgage had to be made. He was to get all he could at 5 per cent. and the balance at 6 per cent.”

And Ellis testified: “I told him we could get a first loan for all the farm would stand for 5 per cent. . . . We told him we could get all the farm could stand in the first mortgage at 5 per cent. It would be a higher rate for the balance. We did not know how much at that time. We saw him again that afternoon after we had been to town. We told Mr. Depugh at that time that Mr. Burke was to furnish the first loan at 5 per cent. and the balance at 6 per cent., but we did not know yet whether we could close the deal until we had seen Mr. Nelson as his price was still \$70.” Burke was recalled, and testified as follows: “I have an independent recollection that I made out the mortgage, the body of it. It was signed in my presence as a witness. I do not now recollect how many days before the mortgage was drawn that Mr. Brown came to see me about it. Mr. Brown did see me about making the loan. He did not say anything about the per cent. at any time. At that time first mortgages could be had at 5 per cent.”

On this record the case was submitted with the results hitherto stated. Defendants contend (1) that there is no testimony to support the verdict; (2) that the court erred in giving and refusing certain instructions; and (3) that on the whole record there should be no recovery. The basis of all of these contentions is that plaintiff was guilty of such negligence in signing the mortgage without reading and in not attempting to get his money at a lower rate, or at least in not advising with defendant before signing the mortgage that he cannot recover. The trial court submitted the case to the jury for its determination of this question of negligence, instructing as follows:

(11) The defendant Brown claims that, in executing said mortgage to W. J. Burke the plaintiff did not have the same read over to him, and did not read the same himself, and that the plaintiff was negligent in thus executing this mortgage without having the same read over to him or reading the same himself, and in not learning the rate of interest provided for therein.

(12) 'Negligence,' as that term is here used, means the 'want of ordinary care'; that is, the want of that degree of care and caution which an ordinarily prudent person would exercise when placed under like circumstances, in conducting a similar business or in doing like acts. It appears from the evidence without conflict that, when the plaintiff executed the mortgage to W. J. Burke, he did not read the same, or request that it should be read to him.

(13) Ordinarily, where one is executing papers, like the mortgage in question, business prudence requires of him that he should either read the same or require the same to be read to him, so as to inform himself of its contents. And, where he fails to do this, he cannot be heard to complain that the instrument contains provisions to which he did not agree. He is presumed to have agreed to what is contained therein, and, unless some fraud or circumvention is practiced upon him to mislead and deceive him and prevent him from reading the instrument, he cannot be heard to complain that the instrument is different from what he believed it to be. And under the facts disclosed in the evidence in this case, unless the circumstances surrounding this transaction were such as to indicate to him and induce him to believe in the exercise of reasonable care and prudence upon his part, that the defendant Brown had looked after the matter and knew what the mortgage contained, then the plaintiff, in signing said mortgage, without reading the same, or requiring it to be read to him, was negligent, and such negligence, upon his part, would prevent his recovery in this case. Unless, therefore, it appears from the evidence before you that the representations made by the defendant Brown, if any were made by him, that the said Burke would furnish said money at 5 per cent., and the fact, if it be a fact, that the defendant Brown was at the office where the mortgage was executed, and directed that said Burke should draw the papers, were such circumstances as would have led a rea-

sonably prudent person to withhold from reading said mortgage or causing the same to be read to him, under like circumstances as those disclosed in the evidence before you, before signing the same then the plaintiff was guilty of negligence in signing such mortgage, without knowing the contents thereof and such negligence would defeat his recovery in this action. Whether the defendant Brown had represented to plaintiff that said Burke had agreed to furnish the money at 5 per cent., and whether or not defendant Brown was present at the time said papers were drawn, and whether or not the defendant Brown stated to plaintiff that the said Burke would draw the papers, are questions of fact to be decided by you from the evidence before you; and, even if such facts be shown, it is also for you to say whether or not such circumstances, if shown, were such as would have led a person of ordinary care and prudence, under such circumstances, to sign said mortgage, without reading the same or causing the same to be read to him.

These instructions are complained of, and it is also contended that the trial court erred in not giving the following requests:

(3) You are instructed that, if the plaintiff signed the note and mortgage in question without reading them or trying to inform himself as to the rate of interest the same bore, his negligence in so signing same would preclude his recovery herein.

(4) Where a party signs a contract without reading it, and the contract contains provisions different from the agreement between the parties, the party signing without reading is bound by such contract on account of his negligence.

These present the opposing views of the parties, and defendant contends that the trial court was in error in submitting the question of negligence at all, and that, if this be not true, it erred in its manner of submission because it referred to matters not supported by the testimony. We are of opinion that the question of negligence on the part of plaintiff was

involved, and that there was testimony in support of all the matters referred to in the instructions. The case is peculiar, in that plaintiff went to the very man for his money to whom he was directed by defendant, and was led to understand that the rate of interest was agreed upon by defendant and Burke. Burke read him one of the mortgages, the one bearing 5 per cent. interest, and, as the other was not read, plaintiff might well have assumed that the second bore the same rate. The conduct of all of the parties was such as to put plaintiff off his guard, and a jury was justified in finding that he was not negligent. He was not under the circumstances required to notify defendant, for he went to the very man with whom he thought defendant had arranged for the money, and did not know that the second mortgage bore eight per cent. interest until some time after it was made. He had the right to assume that defendant's arrangements with Burke were being carried out. There was no error as we have said in submitting the question of plaintiff's negligence.

The trial court fixed the amount of plaintiff's recovery in the event the jury found for him at 3 per cent. on the amount borrowed. In this there was no error. Plaintiff was entitled to that or nothing, and there was nothing for the jury to do in any event but to make the computation. There was no error then in the action of the trial court in doing it for them.

The statute of limitations did not begin to run until plaintiff suffered some loss, and this was when he was compelled to pay the extra 3 per cent. This being true, the action is not barred. No prejudicial error appears, and the judgment must be, and it is, *Affirmed*.

2. DAMAGES: instruction as to amount of recovery.

3. LIMITATION OF ACTIONS.

STATE OF IOWA V. JOHN BUFORD.

Examination of witnesses: LEADING QUESTIONS. Where it appeared
1 from the answers of witnesses for the state that they were not
led by the method of examination, the defendant could not com-
plain that the questions were leading.

Criminal law: MURDER: SELF-DEFENSE: EVIDENCE. Where the defend-
2 ant in a prosecution for murder offered evidence of the general
reputation of deceased for viciousness, and himself testified that
deceased had told him of killing a man some time previously, and
that other like difficulties with deceased had come to his knowledge,
the exclusion of the evidence of a witness that he had heard de-
ceased say that he had shot a man in the back, offered on the ques-
tion of self-defense, was not erroneous, in the absence of a show-
ing that such fact was brought to the knowledge of defendant.

Jurors: BIAS: KNOWLEDGE OF ACCUSED. The defendant in a criminal
3 action cannot complain of the bias of a juror, where it is not shown
that he or his counsel did not know of the matters complained of
before the juror was sworn.

Murder: EVIDENCE. The evidence on this prosecution for murder is re-
4 viewed and held to support conviction for murder in the second
degree.

*Appeal from Monroe District Court.—HON. C. W. VERMIL-
LION, Judge.*

TUESDAY, JANUARY 14, 1913.

DEFENDANT was indicted and convicted for murder of the
second degree for killing one Davenport, and was sentenced to
the penitentiary for a term of twelve years. The defendant
appeals.—*Affirmed.*

N. E. Kendall, and Woodson & Brown, for appellant.

*Geo. Cosson, Attorney-General, and John Fletcher, Assist-
ant Attorney-General, for the State.*

PRESTON, J.—I. The first matter assigned by defendant as error is that, over defendant's objection, the court permitted the prosecuting attorney to ask the state's witnesses leading questions. There were not many of such questions all told, perhaps six or eight in the entire trial; some of these were on re-examination and explanatory of the testimony of the witness on cross-examination. We think the questions were not leading, and the answers show that the witnesses were not led. Defendant has no just cause of complaint as to this matter.

1. EXAMINATION
OF WITNESSES:
leading ques-
tions.

II. This question was put to the defendant's witness Reasby: "Q. Did you ever hear Davenport say he shot a man in the back, who started to run while in a quarrel with him in Kentucky or Virginia?" This was objected to by the state, and the objection sustained. Defendant claimed the shooting of Davenport was in self-defense. The defendant's theory, as we understand it, is that this was admissible as tending to show the quarrelsome disposition of the deceased, and as bearing on the question as to who was the aggressor. The state contends that this question called for a specific act, which was too remote. There is no claim that this particular statement alleged to have been made by deceased to Reasby was communicated to the defendant. Defendant relies on *State v. Donahoe*, 78 Iowa, 486; *State v. Peffers*, 80 Iowa, 580; *State v. Beird*, 118 Iowa, 474. The *Donahoe* case does not directly pass upon this point, but refers almost entirely to the instructions. In so far as it does refer to this question, it is against defendant's contention. In the other two cases the statements of deceased were made a short time prior to the killing, and so closely connected with the transactions leading up to the act of killing as to have a bearing on his intention, disposition, and state of mind at the time the homicide was committed. They were a part of the *res gestæ*. It has been held that particular conduct of deceased, at a time remote

2. CRIMINAL
LAW: murder:
self defense:
evidence.

from the killing and not communicated to defendant, are not admissible, but that the quarrelsome disposition of deceased must be shown by his general reputation. *State v. Sale*, 119 Iowa, 1; *State v. Abarr*, 39 Iowa, 185.

It should be kept in mind that this evidence was offered for the purpose of showing the quarrelsome disposition of deceased as bearing on the question as to who was the aggressor. As we have said, there was no claim that this particular conversation was communicated to defendant prior to the homicide, and there was no offer to so show. It should be stated here that defendant did put six witnesses on the stand who testified to the general reputation of deceased for quarrelsomeness, and the state did not examine any witnesses to rebut this, so that the jury had such testimony in a proper way to aid them in determining who was the aggressor. And further defendant testified, without objection, to a transaction very similar to the one asked of Reasby, except that it was claimed to have occurred in West Virginia. He testified as follows: "He [deceased] had told me how in West Virginia he had a rifle and told a man to 'run, you son of ——,' and the man turned and he shot him in the back,"—that this was the summer before he came to Iowa. Defendant also testified to other similar troubles which had come to his knowledge. This being so, defendant had evidence of this kind both ways; that is such matters to enable him to determine, as a reasonable person, the extent of his peril, by taking into consideration the violent character of his assailant as known to him, as well as evidence of the reputation of deceased for viciousness, to aid the jury in determining the question as to who was the aggressor at the time of the homicide. In view of the foregoing discussion as to the alleged vicious character of deceased, we ought to say that the evidence tends very strongly to show that, during the day of the homicide, defendant was the one who was quarrelsome, and that deceased was not. They had both been drinking together during the day. Defendant had been following deceased, making threats, and deceased more

than once told defendant to go away; that he did not want to have any trouble. The same rule here announced applies to the question put to Mrs. Zimmerman.

III. Defendant further complains because of alleged bias of one of the jurors who sat on the trial. He attached to his motion for a new trial an affidavit of
 3. JURORS: bias: knowledge of accused. another person, setting out an alleged statement of such juror tending to show bias against the colored race. The state filed the affidavit of the juror in resistance, in which he denied making such statement. The affidavits seem to indicate that such statements were not seriously made, or taken by the hearer, if made. There is no showing by defendant and his counsel that they did not know of this matter before the juror was sworn. This is required. *State v. Bussamus*, 108 Iowa, 11. However, the juror in his affidavit states that he had no feeling or prejudice against defendant because of his color or the negro race; that he knew nothing about the case when called as a juror; that he gave defendant the same fair, impartial consideration he would have done if defendant was a white man; that he was not acquainted with defendant, and had no bias or prejudice against him. The juror was not disqualified. 24 Cyc. 281; *State v. Brown*, 188 Mo. 451 (87 S. W. 519).

IV. Lastly it is claimed that the verdict is contrary to the evidence; that the evidence shows that defendant acted in
 4. MURDER: evidence. lawful self-defense. It would serve no useful purpose to review the evidence at length. It will suffice to say, briefly, that six eyewitnesses to the killing testified for the state, while for the defendant no one testified as to the transaction itself, except the defendant. Naturally their stories differ greatly. The evidence tends to show that deceased and defendant had been together during the day, drinking more or less, but up to a short time before the killing they had not appeared to be unfriendly. Deceased had a rifle, but was trying to get away from defendant, who was following from house to house, calling deceased a coward; at one

time defendant told deceased if he would put his gun down he would whip him; at another time, just before the blows were struck, defendant said to deceased if he would put his gun down he (defendant) would beat his brains out, and at that rushed in, grabbed the gun, and defendant either pushed or knocked deceased down, got the gun and struck deceased with it twice, perhaps three times, fracturing the skull in two places. Deceased had more than once requested defendant to go away, and told him he did not want any trouble. Defendant claims he was assaulted by deceased; that he had heard of his quarrelsome and dangerous character; had heard he carried a revolver, and claimed that he was acting within his rights in defending himself. The evidence was such that it was clearly a question for the jury. The verdict is amply supported in the evidence. We have referred in this opinion to all points argued. Defendant has had a fair trial, and we find no error in the record.—*Affirmed.*

H. R. MOSNAT, Appellant, v. H. C. BERKHEIMER and MRS.
H. C. BERKHEIMER, Appellees.

Agency contract: REVOCATION. Although an agency contract for the
1 sale of land on commission provided that it should expire at a certain date, it was subject to revocation by the principal at any time prior thereto.

Specific performance: HOMESTEAD. A contract for the purchase of
2 land including the wife's homestead may be enforced as to the non-homestead land over the objection of both husband and wife; the wife being adequately protected.

Agency contracts: REVOCATION: NOTICE: EVIDENCE. To be effective
3 notice of the revocation of an agency contract for the sale of land must be given to the agent and those who, from a knowledge of his authority or previous dealings with him, would be likely to continue to deal with him relying on his authority. In this action the evidence is held to justify a finding of such notice to a purchaser as would put a prudent man on inquiry as to the agent's authority.

Appeal from Benton District Court.—HON. C. B. BRADSHAW,
Judge.

TUESDAY, JANUARY 14, 1913.

ACTION for the specific performance of an alleged agreement on the part of defendants to convey certain real estate. Plaintiff claims to have entered into a contract for the purchase of the land through one Hall, who, he asserts was defendants' agent for the sale of the land. Defendants denied the agency of Hall, alleged that, while he was at one time an agent for the sale of the land, his agency was revoked shortly after its creation; that it was agreed between them that the contract of agency should be revocable at any time, although this provision was omitted from the contract; that after the revocation of the agency they attempted to sell the land to plaintiff at an advanced price, and, without knowledge that Hall was dealing with plaintiff, they in effect notified him (plaintiff) that the land was not for sale at the price at which it had originally been listed with Hall; and that, plaintiff having knowledge of that fact and without further inquiry as to Hall's authority and for the purpose of defrauding these defendants, he (plaintiff) undertook to buy the property from Hall at a reduced price. They further pleaded that a part of the property was their homestead, and that, as the wife did not join in the contract, the same was void and of no effect. They asked that the contract of sale be declared void and the agency contract reformed to correspond with the real agreement of the parties. Plaintiff denied any mistake in the agency contract, and, admitting the invalidity of the contract in so far as it involved the homestead, asked that the homestead be platted and set aside and the contract enforced as to the lands not homestead in character. Upon the issues thus tendered, the case went to trial before the court resulting in a decree dismissing plaintiff's petition, and also defendants'

cross-petition, and rendering judgment against plaintiff for costs. Plaintiff appeals.—*Affirmed.*

Tom. H. & R. S. Milner and H. R. Mosnat, for appellant.

C. W. E. Snyder, for appellees.

DEEMER, J.—Neither of the parties seem to have got their real bearings until they filed their respective reply arguments. The issues sufficiently appear in the preliminary statement of the case, and it will be noticed that neither pleads a waiver, estoppel, or ratification; nor does plaintiff plead a want of notice of the revocation of the agent's authority. While motions and demurrers were filed, none of them raise any of the doubtful points in the case. Defendants now admit the insufficiency of the testimony to justify a reformation of the agency contract, and they do not question the nature of the original contract of agency. We must assume, then, that defendant H. C. Berkheimer did make one Hall, or the "Hall Real Estate Agency," his agent or broker to sell what was known as his home farm, consisting of 203 acres, and including the homestead of himself and wife for the sum of \$75 per acre. Whether the agent was Hall or the Hall Real Estate Agency, one Hickey was a partner with Hall in the transaction. The contract of agency was in writing and was entered into on the 15th day of March, 1910. So far as material, it reads as follows:

Number of Acres—203 more or less.
Nearest R. R. Town.....Distance.....
Distance to Church.....To School.....
P. O.....Distance.....
I, the undersigned, authorize L. N. Hall, to offer for sale the above described property at a valuation of \$75.00 per acre . . . and if any sale is made by him with my approval, or if made with any person he has introduced, then I agree to pay him \$1.00 per acre as commission with cash,

or approved note as soon as deal is closed to this deal. In case of failure of making payment, and suit is commenced, I agree to pay all expenses of collections, including a reasonable amount as attorney's fees. All advertising to be done free of expense to me, but I agree to give notice at once should I dispose of the property by other means. *This contract expires Jan. 1st, 1911.* Any changes in terms by me, forfeits no commission due agent.

H. C. Berkheimer.

Notwithstanding it was to continue by its terms until January 1, 1911, it was subject to revocation at any time after it was made, for the only interest the agent or agents had in it was their compensation, and this did not create such an interest as to make it irrevocable. Mechem on Agency, sections 204, 205, 207, 208, and cases cited; Huffcut on Agency, sections 64, 65, 67; *Barr v. Schroeder*, 32 Cal. 609; *Hunt v. Rousmanier*, 8 Wheat. 175, (5 L. Ed. 589). So that defendants did not need a reformation of the contract in order to be vested with authority of revocation. Of course, if they were being sued by their agents for damages, such reformation might be essential; but not so here.

Defendant H. C. Berkheimer claims that the agency was revoked both by oral notice and by letter within a month of the time it was created, and the trial court so found. This is a question of fact pure and simple, and we are inclined to agree with the trial court in its finding that the agency was so revoked. There is a conflict in the testimony upon this issue; but defendants seem to have a fair preponderance of the testimony upon this proposition. Had it not been revoked at that time, there is enough in the case to show that plaintiff had such knowledge of its revocation at a subsequent time as to put him upon inquiry, and the nature of his dealings with Hall, after hearing from defendant Berkheimer himself as to his price and terms, were such as to indicate want of good faith.

1. AGENCY CONTRACT: revocation.

We may say parenthetically that, if the only defense were the homestead character of the property, plaintiff would be entitled to enforce his contract as to the non-homestead land; adequate protection being afforded the wife, against the objection of both husband and wife. Upon this point we agree with counsel for appellant. *Townsend v. Blanchard*, 117 Iowa, 36; *Lamb v. Cooper*, 150 Iowa, 18. But the case does not turn upon this proposition. Having found that the agency was revoked, every issue made by the pleading or argued in the original brief is disposed of. But in a reply brief appellant advances the only doubtful propositions in the case. These are: First, was notice to plaintiff of such revocation necessary? And, second, if necessary, was it given?

In *Mechem on Agency* it is said: "In order to render the revocation effectual, notice of it must be given to those parties whom the revocation is desired to affect, and these parties are the agent himself and those persons, who, from knowledge of his authority or from previous dealings with him as such, would be likely to continue the deal with him in good faith upon the strength of the previous authority." Huffcut states the rule as follows: "A revocation is effectual and binding only as against those who have notice that it has been made. Consequently in order to protect himself, the principal must communicate to the revocation not only to the agent, but to all persons who, upon the strength of his previous authority, are likely to deal with him. In case the authority is only for the performance of a special act, however, third persons cannot presume that the agency will continue after the performance of that act, and therefore no notice of revocation need be communicated to them. . . . The method by which the revocation should be communicated varies with each particular case, but the notice must always be sufficient to make the knowledge of the revocation coextensive with the knowledge of that authority. Thus, to persons who have never

2. SPECIFIC PERFORMANCE:
homestead.

3. AGENCY CONTRACTS: revocation: notice: evidence.

dealt with the agent, a general notice through the medium of the public press is sufficient, whether it is seen or not. But to persons who have transacted business with the agent, actual notice must be given, or at least such knowledge of the revocation must be communicated to them as would serve to place a prudent man upon inquiry."

Applying these rules to the case at bar, we have, first, the fact that plaintiff does not, by any pleading, assert want of notice; second, the testimony of any such dealings between him and Hall or the "agency" with reference to the lands, before the revocation of the agency, is not satisfactory, and it quite clearly appears that defendants had no knowledge at any time prior to their personal dealings with plaintiff, which was long after the revocation of the agency, that he was dealing with Hall or the "agency"; and, third, while plaintiff was undoubtedly dealing with Hall before the sale is claimed to have been consummated, he at the same time was dealing with defendant H. C. Berkheimer, and, when he learned that he (Berkheimer) had advanced the cash price of the land to more than \$85 per acre, he hurriedly found Hall, said he would take the land at \$75, paid \$50 to bind the bargain, and thereafter expressed a willingness to increase it to \$2,000 and to pay the balance of the purchase price in cash when the papers were made out. Hall immediately notified Berkheimer of the transaction and Berkheimer at once repudiated it.

It seems to us that the trial court was justified in finding such notice of revocation to plaintiff as would put a prudent man upon inquiry as to Hall's authority to sell for \$75 when the principal Berkheimer was then insisting upon a larger price. Actual fraud need not be shown, but the same facts which would indicate fraud point irresistibly to the fact of notice, or, to what is the same thing, facts which would put a prudent person on inquiry.

While we have gone outside the issues and proper points made in argument, we reach the conclusion that the court did not err in its decree, and it is therefore *Affirmed*.

STATE OF IOWA, v. J. F. LEHLAN, Appellant.

Criminal law: CONSPIRACY: EVIDENCE OF CO-CONSPIRATOR. Where par-

- 1 ties conspire to commit a larceny evidence of the acts and declarations of one in promotion of the conspiracy are admissible against the other. In the instant case the evidence is reviewed and held to justify a finding of conspiracy by defendant to commit a larceny and to render the declarations of the co-conspirator admissible.

Same: HEARSAY EVIDENCE: PREJUDICE. On this prosecution for lar-

- 2 ceny, in which the state relied upon a conspiracy to commit the crime, there was evidence simply of the finding in a certain room of a collar of the size worn by defendant, and of a satchel previously seen in the possession of the co-conspirator: *Held*, that this was not sufficient proof of their occupancy of the room to render admissible and non-prejudicial the statement of officers, who located the stolen goods and arrested the parties, that they had previously heard that accused and a third person were occupying the room.

Same: INSTRUCTIONS. Where the court instructed that the defendant

- 3 should be acquitted unless it was found that the larceny was committed on the date alleged, refusal to further charge that he could not be found guilty of any act done after that date was not erroneous.

Same: LARCENY: RECENT POSSESSION OF STOLEN PROPERTY: EVIDENCE: INSTRUCTION. On this prosecution for larceny, in which

- 4 the state relied upon a conspiracy between the defendant and a third person to commit the crime, the evidence showed that the stolen goods were found in a certain room and in a satchel previously seen in the possession of the third person. The only evidence that defendant occupied the room was the finding of a collar therein of the size worn by him. *Held*, that the evidence was not sufficient to support an instruction on the unexplained possession of recently stolen property, and that the instruction given, to the effect that the finding of the stolen property in the room was presumptive evidence of defendant's guilt, was erroneous, because failing to require a finding that defendant and such third person acted in concert in the commission of the crime.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

TUESDAY, JANUARY 14, 1913.

THE defendant appeals from conviction of larceny from a building.—*Reversed and Remanded.*

Crosby & Fordyce, for appellant.

George Cosson, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.

LADD, J.—I. The defendant and one Harry Borsky, alias Ike Polsky, were jointly indicted for the larceny of several bolts of silk from the store of Welsh-Cook Company in Cedar Rapids. The defendant elected to be tried separately, and argues that the court erred in receiving testimony of the acts and declarations of Borsky in promotion of an alleged conspiracy to steal silks from said store. The evidence tended to show that he and Borsky had registered under assumed names at the Grand Hotel September 18, 1911, and had occupied the same room until the afternoon of September 20th; that on September 19th at about 12:30 o'clock defendant went to the second floor of said store and stood at the silk counter for a few minutes examining the silk and looking about the room, observed a clerk leave for lunch, and talked with the one remaining, followed him to the blanket counter, and told him he would not wait longer for his uncle, and requested the clerk, if his uncle came, to say he would be back about 1:30 o'clock. He did not return, but on the next day Borsky and Robinson came at about the same time—that is, 12:30 o'clock—the former bringing from his room at the hotel a large satchel. This was set down at the top of the

1. CRIMINAL
LAW: conspir-
acy: evidence
of co-conspir-
ator.

stairs, and they advised the manager who had followed them that the firm of Robinson & Cone was transferring a stock from Sioux City to Davenport and they would like to look at blankets. Borsky represented himself as Cone and started for the blanket department with the only clerk on that floor; the other having departed for lunch, as on the day previous. Robinson talked with the sales manager for a few minutes, when the latter returned to the first floor. After looking at blankets near by, Borsky asked to see the woolen blankets, and the clerk took him to a distant part of the floor out of view of the silk counter, and there the latter examined the stock for ten or fifteen minutes. But he did not buy then, as his store was not ready. Requesting a list with prices and the clerk's name, he said he had not had dinner, and he would have to go, shook hands with the clerk several times, took his satchel, and departed down the elevator with Robinson. In the afternoon the clerk who had stepped out to lunch discovered that about fourteen bolts of silk were missing. On the afternoon of September 21st, at about 2:30 o'clock, Borsky called at the dry goods department of Rudge-Gunsel Company in Lincoln, Neb., and began negotiating for the sale of silks which he claimed to have received in a trade and later submitted samples of silks like those stolen. The buyer insisted upon seeing the goods. A deal was not made, but he saw Borsky and defendant together at the Lincoln Hotel the next morning. The defendant registered at the Savoy House at that place in the afternoon of the 22d and remained until the 25th, Borsky sharing his room, and on the later date they left and were seen thereafter entering the Star Rooming House, joining the hotel, two or three times. They were arrested at about 2 o'clock in the morning of September 27, 1911, and, upon searching room sixty-one of the Star Boarding House, the satchel Borsky had at the store in Cedar Rapids and several bolts of silk missed therefrom were found. A collar of size suitable for defendant was found in a hand bag in the room. From this evidence, the jury might well have inferred the existence of a scheme or

plan between Borsky and defendant to commit the offense, and, this being so, the rulings by which testimony of the acts and declarations of Borsky in promotion thereof was rightly admitted.

II. John Schmitt, after testifying that he was a police officer of Lincoln, Neb., and that he was detailed to arrest defendant and locate the stolen silk, was asked

2. SAME: hear-
say evidence:
prejudice. to "state whether or not prior to that time (when they were arrested) you had heard Lehlan and Polsky were occupying room sixty-one at the Star Rooming House." An objection "as calling for hearsay, immaterial, leading, and suggestive," was overruled, and the witness answered, "Yes, sir," and proceeded to testify of having searched the room. A similar question was propounded to W. T. Deveresse, the Omaha detective who located the alleged culprits, and over a like objection he answered in the affirmative. Had other evidence of such occupancy of the designated room been conclusive, the admission of this testimony as explaining the occasion for searching the room might not have been regarded as prejudicial; but no testimony was adduced tending to show that defendant or Borsky was ever in the room, save the finding in a grip of a collar which fitted defendant and the satchel previously seen in Borsky's possession. The room then could not properly have been assumed to have been in their occupancy, and this hearsay evidence might have and doubtless was given consideration by the jury in passing on this issue. The rulings were erroneous.

III. There was no error in refusing to instruct, as

3. SAME: in-
structions. requested by defendant, that the jury could not "find defendant guilty on account of any act of his done after September 20, 1911," for the jury was told that, unless found guilty of the larceny of the silk committed by some one on that day, he should be acquitted. This sufficiently guarded against the possibility of conviction for receiving stolen goods.

IV. The seventh instruction given read: "It is a rule

that the unexplained possession of property recently stolen is

4. SAME: larceny: recent possession of stolen property: evidence: instruction.

presumptive evidence that the person in whose possession it is so found stole it; and if you find in this case, beyond a reasonable doubt, that shortly after the theft of the property described in the indictment, if there was a theft of it, or any portion of it was found in the possession of the defendant in Lincoln, Neb., or in the room which he was, or had been, occupying by himself or with his codefendant, and such possession has not been satisfactorily explained, such possession would be presumptive evidence of the defendant's guilt. And such presumption is not discharged or overcome by the fact that other goods not identified as belonging to the Welch-Cook Company were found at the same time and place."

Though it might have been inferred that defendant was stopping at the Star Boarding House, there was no showing that he occupied room sixty-one when there. The mere fact that a sixteen-inch collar was found in a grip in that room and that defendant wore collars of that size was not alone sufficient to warrant such conclusion.

Another reason for disapproving this instruction is that it declares that the finding of the stolen property in the room occupied by himself and Borsky would afford presumptive evidence of guilt. This is not so unless the jury also found that the two were acting in concert, for the silks were found in the satchel identified as the one Borsky had had in the store. As these were in Borsky's recent possession, to render this binding on defendant as furnishing presumptive evidence of guilt against him, it must also have appeared that he was acting in concert with Borsky. *People v. Niclosi*, 34 Pac. 824; *State v. Raymond*, 46 Conn. 345; *Porter v. People*, 31 Colo. 508 (74 Pac. 879); *States v. Phelps*, 91 Mo. 478 (4 S. W. 119); *State v. Wohlman*, 34 Mo. 482 (86 Am. Dec. 117).

The requirement of such a finding was omitted from the instruction, and the error in so doing is not obviated by the previous instruction, as contended. Again, the possession is

said to be presumptive evidence unless explained. As no explanation was attempted, this may not have been prejudicial error. *Baldwin v. State*, 31 Tex. Cr. R. 589 (21 S. W. 679); 25 Cyc. 152. But it will be as well to instruct more fully on another trial. *State v. Bartlett*, 128 Iowa, 518; *State v. Kimes*, 152 Iowa, 240.

The court did not caution the jury not to consider the evidence of acts and declarations of Borsky alone in determining whether there was a conspiracy between him and defendant. Whether this omission, in the absence of a request, was error, we need not now determine, but mention the matter that it may not be overlooked on another trial.—*Reversed and Remanded*.

CHARLES H. MITCHELL, Appellee, v. WILLIAM GRAVER,
Appellant.

Partition fences: CONSTRUCTION OF TIGHT FENCE. Under the present statutes governing the building of partition fences, an owner who has made his portion of the fence tight can require the adjoining owner to construct his portion in a like tight manner, regardless of whether he uses his land for pasturing sheep and swine or for cultivation.

Appeal from Cedar District Court.—HON W. N. TREICHLER,
Judge.

WEDNESDAY, JANUARY 15, 1913.

THIS is a controversy over a partition fence, and the construction of the statute in regard to such fences. There was a judgment against defendant, and he appeals.—*Affirmed*.

Chas. W. Kepler & Son, for appellant.

C. J. Lynch, for appellee.

PRESTON, J.—The case was tried on an agreed statement of facts. The sole question for determination is whether one adjoining landowner, in this case the plaintiff, who has fully complied with chapter 138, Acts 33d General Assembly by making his portion of the partition fence tight as therein defined, can require the other adjoining owner (defendant) to construct his portion in like tight manner, when he, defendant, is not and has not been using, and is not desirous of using, his land for pasturing sheep or swine, but where he is using said land for pasturing, and cultivating the same. The district court by its judgment answered this question in the affirmative, and required defendant to make his part of the fence a tight fence as defined by the statute. Chapter 138, Acts 33d General Assembly repealed section 2367 of the Code, and was substituted therefor. The first part of the old section and the substitute are the same and define a lawful fence, but the repealed section did not define a tight fence. In the new law the following provision is found which is not in the old: "Provided, however, that all partition fences may be made tight by the party desiring it, and, when his portion is so completed and securely fastened to good substantial posts, set firmly in the ground, not more than twenty (20) feet apart, the adjoining property owner shall construct his portion of the adjoining fence, in a like tight manner, same to be securely fastened to good substantial posts, set firmly in the ground not more than twenty (20) feet apart." is not in the old: "Provided, however, that all partition fence, and continues thus: "In case adjoining owners or occupants of land shall use the same for pasturing sheep or swine, each shall keep his share of the partition fence in such condition as shall restrain such sheep or swine." This language last quoted is also found in the old section. The old section provided that "all partition fences may be made tight by the party desiring it, and at his election, the added material may be removed." This was omitted in the new and in its place was enacted the provision first quoted. Ex-

cept for this change, and the definition of a tight fence, the new statute is the same as the old.

It is apparent that in repealing the old section and enacting the substitute, the Legislature had two purposes in view: First, to define a tight fence, and, second, instead of requiring a person desiring it to make tight the entire partition fence at his own expense, with the privilege of removing the added material, to provide that "all partition fences may be made tight, by the party desiring it, and when his portion is so completed . . . the adjoining property owner shall construct his portion of the adjoining fence in like tight manner," etc. It is appellant's contention that this last provision is in conflict with the later provision in the statute heretofore quoted in regard to each keeping his fence in condition to restrain sheep or swine, and that, in order to construe this law as the trial court did, it is necessary to read out of the statute the later provision. He makes a further claim, and states it this way: "We construe this new statute to mean that, when an adjoining landowner desires to make his part of the partition fence tight, the law points out in what manner he shall make it tight; and then, in case the adjoining owners or occupants of land shall use the same for pasturing sheep or swine, he shall make his portion of the partition fence tight in like manner." In this we cannot concur as to either proposition. It seems to us this would be a strained construction. As to the last proposition the trouble is the statute does not so read. The sum of it all is that where one desires to make his fence tight, and does so, the other must make his fence tight. Nor do we think there is any conflict in the two clauses. There is no conflict in these two provisions, any more than there was in the old statute, which read, as we have heretofore stated, "all partition fences may be made tight by the party desiring it, and at his election, the added material may be removed," and the provision as it appears in both the old and new section, which we have quoted, as to each owner or occupant keeping his share of

the fence in condition to restrain sheep and swine, where each landowner or occupant so uses his land. The first clause in controversy has reference to owners and the other to owners or occupants. Two contingencies are provided for by this new statute—two classes of cases. In the first the statute deals with all partition fences without regard to the use made of the land, and if one owner desires a tight partition fence, and so builds his portion, the other owner must construct his portion in like tight manner. The second class has to do with lands on which sheep and swine are pastured by the owners or occupants, and in such a case each must keep his share in such condition as shall restrain such animals. This case, according to the agreed statement of facts, comes within the first class, so that the latter provision of the statute has no application to the facts here, but there is no conflict between the two clauses referred to. Construing the new act as we do gives force to all its parts, and is such a construction as to accomplish the purposes and intention of the Legislature.

We think the action of the trial court was right, and the judgment is therefore *Affirmed*.

STATE OF IOWA, Appellee, v. MAJOR WALTZ, Appellant.

Malicious mischief: EVIDENCE: MALICE. On a prosecution for malicious

- 1 injury to any building or fixtures attached thereto, the property of another, it may be shown that at the time defendant did the things complained of he used abusive and profane language, as bearing upon the question of malice; and as so limited by the court in this instance the evidence was properly received.

Same: EVIDENCE: FLIGHT. Where defendant, in a prosecution for

- 2 malicious injury committed while intoxicated, was first convicted of drunkenness and ordered to work out his fine, but fled and was subsequently arrested on the graver charge, evidence of his flight was properly received; it being for the jury to determine whether he fled to escape his sentence for drunkenness, or through fear of prosecution for the graver offense.

Same: MALICE TOWARD OWNER OF PROPERTY. Malice toward the owner
3 of property maliciously injured must be established, but it is not
necessary that defendant should have known at the time of doing the
act who the owner was. If at the time of doing the act he was bent
on mischief, prompted by an evil mind to maliciously destroy or
injure the property without regard to its ownership, that is sufficient
malice toward the owner to meet the requirements of the law.

Same: EXCESSIVE SENTENCE. A sentence to the state reformatory of
4 one who, in an intoxicated condition, entered a building, used abu-
sive and profane language, tore loose a machine fastened to the floor
by screws and broke and tore down an electric fixture, was excessive,
and is reduced to six months in the county jail with credit for time
already served.

Appeal from Story District Court.—HON C. G. LEE, Judge.
Affirmed.

WEDNESDAY, JANUARY 15, 1913.

J. F. Martin, for appellant.

George Cosson, Attorney-General, for the State.

GAYNOR, J.—It appears from the record in this case that on the 10th day of January, 1912, the grand jury returned the following indictment against the defendant: "The grand jury of county of Story and state of Iowa accuse Major Waltz of the crime of maliciously injuring a building and fixtures, committed as follows: The said Major Waltz on December 17, 1911, in Story county, Iowa, did maliciously and willfully injure and deface a certain building and fixtures attached thereto in city of Nevada, in said county, the depot of C. N. W. Ry. Co., by then and there willfully, forcibly, unlawfully, and maliciously breaking and tearing up a certain gum machine attached to the floor of said building, and by then and there willfully, unlawfully, and maliciously breaking and tearing down a certain light fixture attached to said building, contrary to a statute made and provided," etc.

To this indictment the defendant entered a plea of not guilty, and upon the issue thus tendered the defendant was tried to a jury and found guilty as charged, and sentenced by the court to five years in the reformatory at Anamosa, Iowa.

The statute under which the defendant was indicted is 4822 of the Code of 1897, as amended by chapter 161 of the Acts of the 31st General Assembly, which reads as follows: "If any person maliciously injure, deface, or destroy any building, or fixtures attached thereto, the property of another, he shall be imprisoned in the penitentiary not more than five years or in the county jail not more than one year or be fined not exceeding \$500.00." The evidence in this case establishes beyond question and beyond all reasonable doubt that the defendant did the things charged in the indictment to have been done by him, and the verdict of the jury is amply sustained by the evidence submitted in the case. It appears from the undisputed evidence and beyond any reasonable doubt that on or about the time stated in the indictment, defendant entered the depot of the Chicago & Northwestern Railway Company at Nevada, Iowa, in an intoxicated condition; that he used abusive and profane language, and sought personal encounter with others in the depot at the time; that he tore from the floor of the depot building a certain gum machine, attached by means of screws, and tore a certain light globe from its fastenings and cast it from him.

Defendant complains of the action of the court in admitting, over his objection, the evidence tending to show that he used abusive and profane language, on the theory that it did not in the least tend to connect the defendant with the acts charged as constituting the crime for which he was indicted. One of the essential elements of the crime charged is malice, and this evidence was admitted by the court simply for the purpose of showing the mental condition of the defendant at the time it is charged that he did the things complained of,

1. MALICIOUS
mischief:
evidence:
malice.

and was by the court limited to that purpose; the court in the ninth instruction saying: "This evidence is not allowed for the purpose of showing the defendant guilty of the crime but for the purpose of showing defendant's mental condition at the time." With this limitation upon the evidence, and for this purpose, the evidence was properly admitted.

It appears, also, from the evidence that subsequent to the 17th day of December, 1911, or immediately thereafter, defendant was arrested for being found in a state of intoxication, and fined \$100, and ordered to work upon the streets of the city; that while so engaged in working upon the streets, and when alone, he left and went to his home at Iowa Falls, where his parents live, and stayed there until he was indicted and arrested later for the crime charged in this case. The evidence tending to show this, however, was objected to, and complaint is now made of the admission of this evidence; it being contended that there is no evidence tending to show that he fled from fear of prosecution for the crime charged in this indictment, and it is assumed in argument that he left simply because he wished to avoid the penalty for drunkenness. That the defendant fled, and went to another part of the state, within a short time after the commission of the act complained of here, is not disputed. Why he left, whether through fear of prosecution for this higher offense, or to escape from serving out his sentence for drunkenness, was a question for the jury, and no error was committed by the court in the admission of this evidence and the court, under its eighth instruction, properly left the question to the jury for its determination.

It is again argued by appellant that the act must be shown to be willful and malicious as to the party whose property is alleged to have been injured. If he were bent on mischief, and willfully and maliciously destroyed the property, it is wholly immaterial as to whether he knew who the owner was

2. SAME: evi-
dence: flight.

3. SAME: malice
toward owner
of property.

at the time of the commission of the act. While malice toward the owner must be established, it is not necessary that the defendant should have known, at the time of doing the act, who the owner was. For if, at the time of the commission of the act, he was bent on mischief, and maliciously destroyed the property, recklessly, without regard to the ownership thereof, prompted by an evil mind to destroy or injure, this will be sufficient malice to meet the law, requiring malice toward the owner.

As to whether the intoxication of defendant at the time was such as to render him incapable of understanding or appreciating his act and its consequences, or such as to make him incapable of entertaining malice, is a question for the jury under all the evidence, and was fairly and correctly left to the jury.

We find no error in the record, except that we are unanimously agreed that the sentence to the reformatory at Anamosa is excessive, and therefore order that the same be reduced to six months in the county jail of Story county, Iowa, and that he be credited thereon for all time actually served in fulfillment of the sentence, if any.

Thus modified, the case is *Affirmed*.

MARY JOHNSON, et al., Appellees, v. WILLIAM K. FOUST,
Appellant.

Trusts: RESULTING TRUST: ENFORCEMENT. Where a husband invested
1 his wife's money in land, taking the legal title in his own name, no presumption of advancement arises, but rather a resulting trust in favor of the wife to the extent of her funds so invested. And where the husband did not deny the existence of the trust but impliedly admitted it, he could not rely upon the statute of limitations, laches or adverse possession to prevent its enforcement.

Appeal from Benton District Court.—HON. CLARENCE
NICHOLS, Judge.

WEDNESDAY, JANUARY 15, 1913.

SUIT in equity to establish a resulting trust in certain lands, the legal title to which is in defendant William K. Foust. The trial court rendered a decree for plaintiffs, and defendant appeals—*Modified and Affirmed.*

C. W. E. Snyder, for appellant.

Struble & Stiger, for appellees.

DEEMER, J.—Plaintiffs are the children of William K. and Anna R. Foust and the sole and only heirs of Anna R. Foust, who died April 23, 1903. They brought this suit to establish a resulting trust in favor of their mother in a certain fractional quarter of land in Butler county, the legal title to which is in their father, the defendant. The defendant denied the alleged trust, pleaded the statute of limitations, laches, and adverse possession, and, upon the testimony adduced, the trial court made the following findings of fact and conclusions of law:

Prior to the year 1878 Anna R. Foust received from the estates of her father and mother the sum of about \$1,600; about the time last referred to she placed the said \$1,600 in the hands of her husband, who is the defendant, William K. Foust, and said William K. Foust, purchased, in connection with his brother-in-law, B. F. Davis, a quarter section of land, the whole quarter section costing \$3,600. The legal title to this land was taken in the defendant, William K. Foust, and he continued to hold it until some time prior to 1886, when the land was sold at an advance of about \$800 on the quarter section, and out of the proceeds of one-half of the sale of the quarter section the defendant, William K. Foust, received \$2,200. The evidence is not clear as to just where the difference between the \$1,600 furnished by Anna R. Foust and the \$1,800 originally paid on this first purchase came from, but in that respect the court gives the defendant, William K. Foust, the benefit of any doubts,

and finds that the difference between said \$1,600 and the \$1,800 was paid by William K. Foust out of his own funds. The result is that the court finds one-half of the interest in the original purchase was paid, \$1,600 by Anna R. Foust, and \$200 by William K. Foust. The court further finds that about March 1, 1886, the defendant, William K. Foust, purchased the southwest fractional quarter of section 7, in township 83 north, of range 12 west, of the fifth P. M., being the land in controversy in this suit; that the purchase price of the land last described was the sum of \$3,700; and at the time of the purchase the defendant, William K. Foust, paid thereon the sum of \$2,200, being the sum he had received out of the proceeds of sale of the land first purchased. The balance of the purchase price in the sum of \$1,500 was evidenced by a note secured by mortgage on the land last described. The original mortgage given to secure the \$1,500 of original price has been introduced in evidence as Exhibit 2, and it appears therefrom, and the court finds, that William K. Foust gave his three notes, of \$500 each, for the said unpaid balance. The court finds that $\frac{16}{18}$ of the \$2,200 in cash paid on the purchase price of \$3,700 of the land that was last purchased were the funds of Anna R. Foust, and the remainder of the \$2,200 cash paid was the funds of the defendant, William K. Foust, and that the $\frac{15}{37}$ of said purchase price represented by notes and mortgages was paid by the defendant, William K. Foust. The court further finds that Anna R. Foust died intestate on or about the 23d day of April, 1903, survived by her husband, William K. Foust, who is the defendant, and the plaintiffs, Mary Johnson, Linda Mester, Grace Wilder, Jesse Foust, and William Foust, who were her children and only heirs at law. There is nothing in the evidence from which the court is able to find any intention on the part of Anna R. Foust to give to William K. Foust the \$1,600 which she originally placed in his hands for investment, or any sums arising out of said original fund or funds. That the said William K. Foust held the original funds in trust, and that the real estate afterwards purchased by him, title to which was taken in his own name, was held by him in trust in proportions found hereinbefore. The court further finds that at no time during the lifetime of Anna R. Foust, nor until the commencement of this suit, did the defendant, William K. Foust, repudiate the trust or deny the ownership of Anna R. Foust.

in the real estate; that any taxes paid or moneys expended on the place were the proceeds of the place, all of which were received by the defendant William K. Foust, and used for the payment of taxes and improvement of the place and the support of the family, and that the defendant has failed to establish his plea of the statute of limitations by the evidence. The court has not considered any matters testified to by the defendant, William K. Foust, in so far as they relate to personal transactions or communications with Anna R. Foust. On the facts found, the court holds that at and prior to the death of Anna R. Foust the said Anna R. Foust was the equitable owner of the $\frac{16}{18}$ of $\frac{22}{37}$ of the land in controversy, and that the defendant, William K. Foust, was the owner in fee of the remainder of said lands, and that upon the death of the said Anna R. Foust the defendant, William K. Foust, became the owner of one-third of the interests which Anna R. Foust had previously owned in said lands; and the plaintiffs in this suit, being children and sole heirs at law of Anna R. Foust, became owners of the remaining two-thirds of the interests which Anna R. Foust owned in said lands at and prior to her death, and that plaintiffs are entitled to decree accordingly.

From these findings and conclusions of law, the plaintiffs have not appealed; but defendant does challenge both the facts and the law as announced by the trial court.

I. As plaintiffs have not appealed, they are in no position to challenge the decree in any particular; and as to defendant's appeal we are satisfied that save in one respect the findings of fact are well supported by the testimony. We shall not quote from the record the evidence justifying the conclusions of the trial court. It is enough to say that plaintiffs made out their case by clear, satisfactory, and convincing testimony. Indeed, the defendant virtually admitted facts which *prima facie* made a case of resulting trust, and this was supplemented by a strong showing of admissions made by him at different times, even down to the commencement of this suit. Plaintiffs fully met the burden imposed upon them in such cases. *Andrew v. Andrew*, 114 Iowa, 524;

McAnnulty v. Seick, 59 Iowa, 590; *Nelson v. Worrall*, 20 Iowa, 469.

There is one question of fact found by the court, however, which we think is not sustained by the testimony, and that is the proportion or share of the purchase price paid by the mother on the first piece of property purchased by the defendant. The trial court found that it was sixteen-eightieths, whereas we are convinced from our examination of the record that the purchase price of the land was \$4,000, of which defendant furnished one-half, or \$2,000, and that of this \$2,000 Anna R. Foust furnished \$1,600, or sixteen-twentieths, instead of sixteen-eightieths. The trial court was evidently misled as to the testimony here, and its opinion should be modified in this respect to correspond with the testimony adduced.

II. The legal propositions implied from the findings of the trial court are sound.

The defendant husband took his wife's money which came from her father's estate, and in conjunction with her brother invested \$1,600 thereof in some land, taking the legal title thereto in the name of himself and her brother. There is no presumption of advancement in such a case as contended for appellant. *Copper v. Iowa Trust & Sav. Bank*, 149 Iowa, 336; *McClenahan v. Stevenson*, 118 Iowa, 106; *Culp v. Price*, 107 Iowa, 133; *Andrew v. Andrew*, 114 Iowa, 524; *Smith v. Smith*, 132 Iowa, 700.

Under such a state of facts, a resulting trust arises by implication. See cases just cited and *Eckert v. Eckert*, 152 Iowa, 745; *Malley v. Malley*, 121 Iowa, 237. Of course, if a gift were intended, no resulting trust would arise; but defendant does not claim that the money was a gift. On the contrary, he many times asserted that the money belonged to the wife, and that, as the matter was all in the family anyway, it was immaterial that he held and retained the legal title. Even if the burden were upon the plaintiffs to over-

come the presumption of gift or advancement, we think they have met that burden.

III. As the defendant at no time denied the trust but from time to time impliedly admitted it, he cannot rely upon the statute of limitations, laches, or adverse possession. *Murphy v. Murphy*, 80 Iowa, 740; *Smith v. Smith*, 132 Iowa, 700; *Zunkel v. Colson*, 109 Iowa, 695.

IV. As plaintiffs' mother did not furnish the entire consideration, but simply an aliquot part thereof, they are entitled to have a trust established in the land to the extent of the proportion of the consideration furnished by their mother, and this we find to have been sixteen-twentieths thereof. The defendant, as surviving husband, is entitled to one-third of this, and the other two-thirds is to be divided share and share alike between the children and heirs at law of the deceased Anna R. Foust. The only error in the decree we have already pointed out, and, to the extent indicated, it must be modified. The case will be remanded to the district court for one in harmony with this opinion. Each party will pay one-half the costs of the appeal.

Modified and Remanded.

E. V. TUTTLE V. JAMES CARRAHER, Appellant.

Intoxicating liquors: SINGLE ROOM. The keeping of a large refrigerator with an ice chest and adjoining storage room for beer, within a single room in which the retail liquor business was conducted, having a street opening for ice and a door from the ice chamber to the storage room, but which was nailed up, was not a violation of the statute requiring that a saloon shall be conducted in a single room with but one entrance.

Same: EMPLOYEES: LISTING OF NAMES. Draymen and carriers engaged in hauling liquors from a railway station or car and putting the same in a refrigerator in a saloon room are not persons employed about a saloon, who are required by statute to be listed with the county auditor, but are engaged in a separate employment having no connection with the saloon business.

Same: INTOXICATED PERSON: EVIDENCE. The evidence in this action
3 is held insufficient to show that defendant allowed an intoxicated person in his saloon, when in that condition; or to establish the charge that defendant failed to list an employee before he began work.

Appeal from Carroll District Court.—HON. M. E. HUTCHINSON, Judge.

WEDNESDAY, JANUARY 15, 1913.

SUIT to enjoin a liquor nuisance resulted in decree as prayed. The defendant appeals.—*Reversed.*

L. H. Salinger and Ralph McClean, for appellant.

M. S. Odle, for appellee.

LADD, J.—The petition alleged that defendant owned certain premises in Liddendale, and therein kept, with intent to sell as a beverage in violation of law, intoxicating liquors, and prayed that defendant be enjoined from so maintaining said premises as a nuisance. The first division of the answer was a general denial, and the second admitted defendant was operating a saloon on the premises in question, but specifically alleged the performance of the conditions precedent exacted by section 2448 of the Code as essential to the bar of the mulct law. Appellant assumed the burden of proving performance of these, but insists that, in the absence of other allegation in the petition and of any reply, other matters pertaining to the operation of the saloon might not be inquired into. Whether this is so need not be determined, for we reach the conclusion on the merits that the court erred in entering the decree.

I. In the single room with door opening on a public business street there was an ice box eighteen feet long and

nine feet wide. It was eight feet four inches high, with ceiling more than a foot and a half farther up, and would hold a car load of beer. Along the east side of the refrigerator next the outside door was the ice chamber or rack. Through an opening from the outside ice was put into the chamber. This opening was about two feet wide and five feet high, with the lower part seven or eight feet above the surface. There was a door from the ice chamber into the room where the beer was stored, but it had been nailed up, and was so kept. This box was not fastened to the building save by its weight, and the inside, because of the low temperature, could not well be used as a place for dispensing or drinking intoxicants. It was not a separate room, but a box in the single room for the convenient and hygienic keeping of the beer, where readily accessible as required for consumption. Manifestly the hole through which ice was passed into the ice chamber afforded no entrance to or exit from the room, and the refrigerator was not a separate room within the meaning of the mulct law, exacting that the retail liquor business be carried on in a single room, with but one entrance or exit. *State v. Donahue*, 120 Iowa, 154.

II. The defendant employed different draymen with helpers to haul cases, kegs, and barrels of beer from the railway station or cars, and put them in the refrigerator. In doing so they necessarily crossed the saloon from the door to the refrigerator and appellee contends that their names should have been listed with the county auditor. Paragraph 4 of section 2448 requires that "a list of names of all persons employed about the place shall be filed with the county auditor and no person shall be permitted behind the bar except those whose names are so listed." This has reference to those in some manner connected with the operation of the saloon as bartenders, porters, and the like. The last clause is intended to exclude every one whether employees or not when not so listed from behind the bar, but the first clause does not limit those who

1. INTOXICATING
LIQUORS: sin-
gle room.

2. SAME: em-
ployees: list-
ing of names.

shall be listed to persons who go behind the bar. Any one actually engaged about the premises and in some way in the work of carrying on the business of operating the saloon must be listed as an employee. *Pumphrey v. Anderson*, 141 Iowa, 201. Those not participating therein are not included. In a sense a carpenter called to repair a defect in the floor or a glazier to replace a broken light, or a plumber to stop a leak, are employed about the place, but no one would contend that any of these should be included in the portion of the statute quoted. This is for the reason that what they may do is merely incident to but without connection with the business carried on in the place. The same is true of the draymen. They are not servants of the defendant, though they render services for compensation, and in doing so they necessarily enter the saloon, and carry the beer to its destination. But this can no more be said to connect them with the operation of the saloon than hauling goods to a mercantile establishment can be said to render them participants in conducting it. They are common carriers pursuing an independent employment, having no connection with the business, and the circumstance that in hauling the beer they necessarily pass over the floor of the saloon is a mere incident to the performance of their duty as such, and does not constitute them employees engaged about the place within the meaning of the statute.

III. Paragraph 10 of section 2448 of the Code declares that "no minor, drunkard or intoxicated person shall be allowed in the room." One Brown was employed as porter,

and it was contended he was a drunkard, or
3. **SAME: intoxi-** at least was allowed in the saloon when
cated person:
evidence. intoxicated. The evidence was not sufficient to characterize Brown as a drunkard. What he would have become had he a chance is mere matter of conjecture, and of no concern in this inquiry. Nor do we regard the evidence sufficient to justify the inference that he was allowed about the saloon when intoxicated. D. Borcharding, mayor of the town, declined to swear that he ever saw him intoxicated, but

indicated that he had seen him under the influence of liquor sometimes, and that he not only used profane, but vulgar, language, and that he did not use this as often when not under the influence of liquor. Wm. Rohrbeck, marshal of the town, testified that Brown "gets pretty well top-heavy. I suppose he does every chance he gets. I think he would get that way more than once a week." Probably Brown got "top-heavy" too often, but the record falls short of indicating that he was allowed in defendant's saloon when in this condition.

IV. The name of Brown was listed with the county auditor as an employee about the saloon in December, 1911, but it is contended that this was not done before he began work as a porter. Rohrbeck testified that about December 20th, and after Brown began work, he examined the list on the file with the county auditor, and that his name was not then on the list. The witness on cross-examination said he examined the list because he was assessor, and later that his official duties had nothing to do with it. He had been an applicant for permission by the town council to operate the saloon when defendant was granted this, and admitted that, should anything happen to defendant, he was planning to run the saloon himself if he could "get a chance." The defendant swore that Brown's name was listed before he began work, but could not recollect the date, and the auditor's record did not show this. Both were interested witnesses with nothing indicating the one to be of greater credibility than the other save that defendant, in view of his situation, would be the more likely to know whether Brown began work before his name was listed. We are inclined to the conclusion that the alleged omission to put the name on the list for a few days was not established by a preponderance of the evidence. It follows that the petition to enjoin should have been dismissed.
—*Reversed.*

HENRY S. KEELY, Appellant, v. BOARD OF SUPERVISORS OF DUBUQUE COUNTY, IOWA, and JOHN P. KINGSLEY, JOS. CONNOLLY, JOHN L. COONEY, M. W. DALY, FRANK D. FERRING, T. H. MCQUILLEN and JOHN VORVALD, Acting as the Board of Supervisors of Dubuque County, Iowa.

Soldiers' relief: DISBURSEMENT OF FUNDS: COMMISSION. The statutes

- 1 providing a fund for the burial of indigent soldiers, and its distribution through a soldiers' relief commission consisting of three persons, two of whom shall be honorably discharged Union soldiers, sailors or marines, contemplate the appointment of veterans of the Civil War between the states, in preference to veterans of the Spanish War.

Certiorari: WHO MAY MAINTAIN SAME. Certiorari is not a remedy

- 2 available to an individual who has no direct interest in the matter to be reviewed, and who does not show that he will suffer special injury beyond that which will affect him in common with the general public, or others similarly situated; especially where there is another available remedy.

Soldiers' relief commission: APPOINTMENT: QUO WARRANTO. Quo

- 3 Warranto is the proper remedy for testing the act of county supervisors, where it is claimed that they have improperly appointed a veteran of the Spanish War as a member of the soldiers' relief commission, when the statute gives a preference to veterans of the Civil War.

Appeal from Dubuque District Court.—HON. JOHN W. KINTZINGER, Judge.

THURSDAY, JANUARY 16, 1913.

DEMURRER to the petition praying that a writ of certiorari issue was sustained, and, as plaintiff elected to stand on the ruling, the petition was dismissed. The plaintiff appeals.—*Affirmed.*

John R. Waller, George Cosson, Attorney General, and Henry E. Sampson, Special Counsel, for appellant.

P. J. Nelson, County Attorney, for appellees.

LADD, J.—Section 430 of the Code Supplement authorizes the board of supervisors to levy a tax to create a fund “for the relief of and to pay the funeral expenses of honorably discharged indigent United States soldiers, sailors, marines and their indigent wives, widows and minor children.”

1. SOLDIERS' RELIEF: disbursement of funds: commission.

The next section directs that the fund “shall be disbursed by the soldier’s relief commission which shall consist of three persons, two of whom shall be honorably discharged Union soldiers, sailors or marines to be appointed by said board . . . at the regular meeting in September,” and provides for the qualification and organization of such commissioners. Section 432, Code Supplement, specifies their duties. The petition alleged that plaintiff was a citizen of Iowa and resident of Dubuque county, and an honorably discharged Union soldier, that but one of the two incumbents of the commission for Dubuque county was a Union soldier, and that, notwithstanding this, the board of supervisors appointed George Schaffhauser to fill the vacancy, though he was not a Union soldier, but was an honorably discharged soldier of the Spanish War, and prayed that a writ of certiorari issue to test the validity of such appointment. A few days later E. H. Smith filed a petition of intervention, making like allegations ending with the same prayer. In response to an order to make the petition more specific, plaintiffs alleged the appointment was prejudicial to intervener, who was a candidate for the position. In a second amendment it was alleged that refusing to appoint Smith deprived him of emolument of \$75 per annum paid each commissioner for services as such. A demurrer on the grounds (1) that no prejudice resulted to plaintiffs from the action of the board, (2) that plaintiffs had no interest in the contro-

versy, and (3) that Schaffhauser possessed the qualifications for the position exacted by statute was sustained, and it is of this ruling that complaint is made.

Taking up the grounds in the reverse order, it is to be said that what was intended by the statute is perfectly manifest. The soldiers, sailors, and marines who fought in the Civil War of 1860-65 are now referred to, and since that conflict terminated have been referred to as Union soldiers, sailors, or marines; and Confederate soldiers, sailors and marines; the former having fought to preserve the Union of the states and the latter for the establishment of the so-called confederacy. No argument is required to demonstrate that the Legislature in enacting this statute intended that two citizens known to have been Union soldiers, sailors, or marines of the Civil War and honorably discharged should be incumbents on the soldiers' relief commission. This does not exclude the Spanish War veteran as three constitute the commission, but does give preference to the Civil War veteran, probably because a greater number of these will require relief and interment.

Of course, it was the duty of the board of supervisors to obey the law in making the appointment, but the remedy chosen is not available to correct the error in which that body has fallen. In the first place, plaintiffs do not aver that either of them are directly interested, or that either have been, or are likely to be prejudiced by the action of the board. True, the amendment to the petition alleged Smith was an applicant for the place, but the board of supervisors is not limited to those applying from which to make selection. Any citizen of the designated class would be eligible, and the only effect of nullifying the appointment of Schaffhauser would be to clear the way for some one of the class designated by statute. The writ of certiorari is not available to an individual who has no direct or particular interest in the proceedings sought to be reviewed, and who does not show that he will suffer a special injury beyond that which will affect him in common with the public

2. CERTIORARI :
who may
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or others similarly situated, especially where another remedy is available. 6 Cyc. 768; *Welsh v. Mahaska County*, 23 Iowa, 199; *Darling v. Boesch*, 67 Iowa, 702; *Iowa News Co. v. Harris*, 62 Iowa, 501; *Smith v. Yoram*, 37 Iowa, 89; *Iske v. City of Newton*, 54 Iowa, 586; *Wilson v. Remley*, 106 Iowa, 583; *Davis County v. Horn*, 4 G. Greene, 94; *Collins v. City of Keokuk*, 108 Iowa, 28; *Blodgett v. McVey*, 131 Iowa, 552; *Polk County v. District Court*, 133 Iowa, 710; *Mayor, etc., Jersey City v. State*, 53 N. J. Law, 434 (22 Atl. 190). This rule has been so far modified as to permit the writ to be sued out by persons whose interests are identical with the mass of the community, where the matter sought to be reviewed affects the public generally, or where private rights are invaded by persons clothed with authority. 6 Cyc. 769; *State v. Mayor, etc., of Jersey City*, 63 N. J. Law, 96 (42 Atl. 782). The petition contained no averment bringing the case within these exceptions. Though the person appointed did not possess the qualifications prescribed by statute, there is no pretense that the public or individuals will suffer injury or inconvenience therefrom. Nor in the absence of statute so providing is the writ available to try the title to office. *Desmond v. McCarty*, 17 Iowa, 525; *Miller v. Washington*, 67 N. J. Law, 167 (50 Atl. 341); *Britton v. Steber*, 62 Mo. 370; *People v. Walter*, 68 N. Y. 403.

It would be unfair to deprive the incumbent of the office to which he has been assigned because of disqualification with-

3. SOLDIERS' RE-
LIEF COMMIS-
SION : quo
warranto. out affording him an opportunity to be heard as a party to the action, and for this reason all the more recent decisions regard proceedings in the nature of quo warranto as the proper remedy. *Daniels v. Newbold*, 125 Iowa, 194.

The object of this proceeding seems to have been to remove the incumbent so as to clear the way for some member of the class from which the board of supervisors might select, but, according to the decision last cited, such a suit, being purely anticipatory, cannot be maintained. As there said, "the court

will not permit him to litigate in certiorari proceedings to which his real adversary is not a party the very question which can be effectually settled only on information in the nature of quo warranto." The board of supervisors had authority to appoint, but, at most, erred in selecting a person not qualified as prescribed by statute, and the remedy available in such cases is by proceedings in the nature of quo warranto provided by chapter 9, title 21, of the Code.

The demurrer was rightly sustained.—*Affirmed.*

J. S. CONDIT, Appellee, v. WALTER JOHNSON and MILTON BYERLY, Appellants.

Irrigation bonds: LIENS: STATUTES. Irrigation bonds issued under
1 the statutes of Colorado, which provide for the issuance of irrigation district bonds to be paid from annual assessments upon the land within the district, are not a special lien upon the lands of the district, but the assessments levied for payment of the bonds are liens; and a decree of court which attempts to make the bonds a specific lien is in excess of jurisdiction.

Same: FOREIGN LAWS: PRESUMPTION. In the absence of any show-
2 ing to the contrary it will be presumed that the statutes and laws of another state are the same as those of this state; and under the law of this state the bonds issued for a public improvement are not a lien upon the property of the municipality or district.

Vendor and vendee: OBJECTIONS TO TITLE: WAIVER. Where a pur-
3 chaser of land objected to the vendor's title on specific grounds, he cannot change his grounds of objection when the contract is sought to be enforced.

Same: SPECIFIC PERFORMANCE: LIABILITY OF GUARANTOR. Where a
4 vendor of land, which he had contracted to convey free of liens in settlement of litigation, had paid all taxes and assessments levied to pay irrigation bonds of the district in which the land was situated, and which were due at the time he offered to convey, he was entitled to specific performance of the contract of settlement; as the bonds themselves were not liens upon the land

which he was bound to discharge. And where the purchaser failed to perform his part of the contract a judgment was properly rendered against his guarantor.

Appeal from Jones District Court.—HON. MILO P. SMITH,
Judge.

THURSDAY, JANUARY 16, 1913.

ACTION in the nature of specific performance for the enforcement of an agreement of settlement entered into between plaintiff and defendant Johnson, guaranteed by defendant Byerly. The trial court granted the relief asked, and defendants appeal.—*Affirmed.*

James J. Sullivan and Herrick, Cash & Rhinehart, for appellants.

Remley & Remley, for appellee.

DEEMER, J.—In December of the year 1908 plaintiff purchased of defendant Johnson three hundred and twenty acres of land in Saguache county, Colo., agreeing to pay therefor the sum of \$10,400. Defendant Johnson was a real estate dealer, and it is claimed that he made certain representations regarding the character of the Colorado land. At any rate, he executed to plaintiff a warranty deed for the land, and thereafter plaintiff, claiming to have been defrauded, and that there had been a breach of the covenants of warranty in the deed made to him, brought suit against defendant Johnson in the district court of Jones county to recover the damages claimed to have been suffered by him. At or about the same time defendant Johnson brought suit against plaintiff in a Colorado court to have the warranty deed corrected so as to exempt from the covenants a railway right of way through and across the said land, To this action plain-

tiff herein appeared, and claimed that the original contract for the purchase of the land had been altered after its execution. In this condition of affairs the parties concluded to settle their differences and on the 18th day of October, 1910, they met and entered into the following written agreement:

Agreement entered into this 18th day of October, 1910, between J. S. Condit, of Costilla county, state of Colorado, party of the first part, and Walter Johnson, of the city of Denver, state of Colorado, party of the second part, witnesseth: Said first party hereby sells to second party the north half of section twenty-eight (28), township forty-one (41), range ten (10), Saguache county, Colorado, for the sum of nine thousand five hundred (\$9,500.00) dollars. Said first party agrees to transfer with said land all rights which he has received in his deed in water for irrigation purposes in connection with said land. Said conveyance to be executed and delivered by the 1st day of March, 1911, and to be by warranty deed as against all liens and incumbrances on said property, including taxes for the year 1910. But said deed is to be subject to the right of way of the railway company running through said land. Said second party agrees to pay for said land said sum of \$9,500.00 in the following manner, to wit: Four thousand (\$4,000.00) dollars to be paid in cash March 1st, 1911, when said deed is delivered, and that he will execute a note for five thousand five hundred (\$5,500.00) dollars to the said J. S. Condit and secure same by a first mortgage upon the above described premises. Said note to draw 6 per cent. interest, payable annually and due one year from date, and to include the ordinary attorney fees in said note and mortgage in case of foreclosure. It is further agreed that said first party will dismiss the suit now pending in the district court of Jones county, Iowa, against said second party at his cost as soon as this contract is completed and delivered, and said second party agrees on his part that he will dismiss the suit pending in the district court of the state of Colorado, in and for Saguache county, entitled Walter Johnson v. J. S. Condit, defendant, and that he will pay the costs thereof. It is further agreed that this contract when fully executed and delivered shall be a full settlement of all differences between the parties

hereto, and that all contracts and agreements relative to the matters between them shall be surrendered or destroyed. Said second party agrees to accept the title of said property as complete and correct up to the time when he conveyed the same to said first party. The deed and abstract of the land, four water certificates shall be delivered to said second party at the Citizens' Savings Bank, Anamosa, Iowa, and the money to be paid to said first party shall be paid him at the Citizens' Savings Bank, Anamosa, Iowa. Witness our hands the first day above written. J. S. Condit, First Party. Walter Johnson, Second Party.

I hereby guarantee that the said Walter Johnson will pay the \$4,000.00 as provided in this contract and will execute said note and mortgage as required by this contract on the 1st day of March, 1911. Milton Byerly.

I hereby guarantee that J. S. Condit, party of the first part, will fully comply with the requirements of this contract on his part. Wm. A. Hale.

Thereafter, and on March 1, 1911, the parties met at Anamosa, in Jones county, for the purpose of carrying out the agreement. Plaintiff produced a warranty deed to Johnson, the tax receipts, four shares of the irrigation company stock, and an abstract of title to the land. Plaintiff had made a mortgage upon the land to E. M. Condit, but the abstract showed a cancellation of the same of record, and he, plaintiff, also presented to defendant the original note and the mortgage made to secure the same. Johnson objected to the four shares of stock, because they showed an indorsement of \$440 thereon. Plaintiff, Condit, then offered to pay Johnson the \$440 received by him, or to get four other shares showing no indorsement whatever. No further objection was made to these shares. Defendant, through his attorney, then refused to perform his part of the contract because he claimed that an irrigation district had been established in Colorado, which included the land in controversy; that bonds to the amount of \$530,000 had been issued by the district; that these bonds became a lien or incumbrance upon the land while the title was in plaintiff, and insisted that the land was liable for its

pro rata share of this bond issue, and that the bonds became a specific lien upon the property. He insisted that plaintiff pay his pro rata share of this bond issue, amounting to \$2,432; and upon plaintiff's refusal to do so, he declined to carry out the contract.

I. This action followed, and the sole issue in the case, after eliminating all collateral matters, is whether or not plaintiff is responsible for any part of this

1. IRRIGATION
BONDS: liens:
statutes.

bond issue, or, rather, whether or not it is a specific lien upon the land, and, if so, is it such a lien as that plaintiff must satisfy it before he may recover upon the agreement of settlement. It appears that, when plaintiff originally purchased the land, an irrigation company had been organized for a district which covered the land, and that four shares of stock in this company which had been issued to Johnson passed to plaintiff with the land. These are the shares already referred to upon which the \$440 was indorsed. In October of the year 1908 and prior to plaintiff's purchase of the land from Johnson a petition had been filed for a larger and stronger irrigation company to manage and control the district in which the land in controversy was situated. This petition was signed by a majority of the resident freeholders in the proposed district. Due notice thereof had been given, and the county committee, to whom it was addressed, had granted the prayer thereof, defined the boundary of the new district, and christened it the "San Luis Valley Irrigation District." An election was called pursuant to the Colorado statutes for December 19, 1908, and such election was held. Upon a canvass of the votes, the board declared the district established and the officers elected, and certified copies of all the proceedings were filed in the county in which the land in controversy was located on December 28, 1908, the very day on which plaintiff received his deed. On January 11, 1909, a resolution was passed by the officers of the new company authorizing the issuance of \$530,000 bonds and the purchase of the

rights of the original company for the sum of \$225,000, and on June 19, 1909, the original company sold out to the new company for \$230,000 in bonds and \$67.50 in cash. Plaintiff said he had nothing whatever to do with these proceedings, but that he paid the water tax levied against the land for the two years he held it, amounting to nearly \$400. He also received \$440 in cash as the first installment on the original shares of stock in the old company, which had been assigned to him by Johnson. Although not pleaded in answer as a defense, defendants were permitted to introduce in evidence what is called a confirmation decree of the district court of Rio Grande county, Colo., with reference to the establishment of the San Luis Valley Irrigation District, which decree, after reciting all the facts with reference to the establishment of the district and the proceedings of the board of county commissioners and of the district, concluded as follows: "That the said bonds and the form thereof were duly examined by the board as to the preliminary proceedings in any manner affecting their issue, and as to the conformity with the provisions and regulations of said act as amended, and said bonds are hereby approved and confirmed as the bonds of the said San Luis Valley Irrigation District; and are hereby ordered, adjudged, and decreed to be a legal and valid indebtedness of said district, and that said indebtedness constitutes a lien upon all real property in said district, to be paid and discharged, both as to principal and interest by revenue derived from annual assessments and taxation upon all the real property included within said district."

Neither plaintiff nor defendant was a party to this proceeding, and the nature thereof is indicated only by reference to such Colorado statutes as were introduced in evidence. These will be hereinafter referred to. These proceedings were all referred to or noted on the contract which plaintiff tendered to defendant Johnson, and the first question for consideration is: Was plaintiff bound to discharge his pro rata share of this bond issue before demanding per-

formance of the agreement of settlement? He tendered defendant a full warranty deed against all claims whatever except the railway right of way running through the land. Without proper pleading, defendant introduced certain statutes of the state of Colorado, which, so far as might be deemed material, if properly pleaded, read as follows:

Section 3454, in so far as material to this appeal: 'The lien for taxes for payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue.' Section 3455 provides for advertising and selling the bonds. 'Such bonds shall not be disposed of at less than 95 per cent. of the face value thereof.' Section 3456 provides: 'Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided.' Section 3458: 'It shall be the duty of the county assessor of any county embracing a whole or a part of any irrigation district to assess and enter upon his records as assessor, in its appropriate column, the assessment of all real estate exclusive of improvements, situate, lying and being within any irrigation district, any whole or any part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of said assessment to the county commissioners of the county in which the office of said district is located. All lands within the district for the purpose of taxation under this act, shall be valued by the assessor at the same rate per acre.' Section 3459 provides it shall be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide same amount of money required to pay the interest and principal of the bonds of said district as the same shall become due. Section 3460 provides for the purpose of said district: 'It shall be the duty of the county commissioners of each county in

which any irrigation district is located, in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified upon all real estate in said district within their respective counties. All taxes levied under this act are special taxes.' Section 3461: 'The revenue laws of this state for assessment, levying and collection of taxes upon real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalty and forfeiture for delinquent taxes.' Section 3489 provides that the board of directors of an irrigation district may commence special proceedings in which the proceedings of the board providing for the issue and sale of bonds of the district, whether the bonds have or have not been sold, may be judicially examined and confirmed. Section 3490 provides that the board shall file a petition in the district court in the county in which the lands of the district, or a portion, are situated, praying that the proceedings may be examined and confirmed by the court. The petition shall show the proceedings had for the sale of bonds, and shall state generally that the district was duly organized, and the first board of directors was duly elected. Section 3491 provides that the court shall fix the time for the hearing of the petition, and shall order the clerk to give a public notice of the filing of the petition; that the notice shall be published for three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place of hearing of the petition, and that any person interested in the organization of the district, or in the proceedings for the issue of bonds, may on the day fixed for the hearing demur or answer said petition. The petition may be referred to as the petition of the board of directors of the irrigation district, giving its name, and praying that the proceedings, the issue of bonds, may be approved and confirmed. Section 3492 provides any person interested in the said district or the issue of bonds may demur or answer the petition, and provides that the Code of Civil Procedure shall apply upon the hearing. The person demurring or answering the petition shall be the defendant, and the board of directors the plaintiff. The material allegations of the petition not specifically controverted by the answer shall be taken as true, and the person failing to answer shall be deemed to admit the material statements of the petition. Section 3493 provides, upon

the hearing of the special proceedings, the court shall find and determine whether the notice of filing the petition was duly given and published in the time and manner as provided, and shall have power and jurisdiction to determine the legality and validity of and approve and confirm all of the proceedings for the organization of the district and all other proceedings relating to the legality and sale of said bonds. The court, in inquiring into the matter, must disregard any irregularities or omission, which does not affect the substantial rights of the parties, and the court may by decree approve and confirm the proceedings and disapprove and declare legal or invalid other or subsequent parts of the proceedings.

It will be observed that none of these statutes authorize a decree making any part of the bond issue a specific lien upon the land within the district, and, in so far as the decree in fact entered undertakes to do so, it is in excess of jurisdiction and to that extent void. Indeed, it is doubtful if the decree does in fact make any aliquot part of the bond issue a specific lien; but, if it did, it would be void. The statutes with reference to the bond issues do not make the bonds a specific lien upon the property within the district, at least none such were pleaded or introduced in evidence.

We are referred to some decisions of the Colorado courts, which were not pleaded or introduced in evidence, and, of course, are not binding upon us as precedents. They may be accepted for what they are worth, but they are not conclusive. Indeed, defendants do not plead a former adjudication, and that matter is out of the case. In our view of the case, the bonds issued by the irrigation district were not specific liens or incumbrances upon the land. They, with the interest thereon, were to be paid by annual assessments against the lands within the district and not otherwise. They could not be enforced by judgment or levy upon the lands; although, were judgment obtained, the taxing power might be compelled by mandamus to levy a tax to pay the judgment, but this is the only remedy which the bondholders

would have. It is not the bonds which are made liens upon the lands, but the taxes levied for the payment of interest and principal. This is apparent from a perusal of sections 3453 and 3456 of the Colorado Statutes. The comformatory degree also provides that the bonds are to be paid from annual assessments and taxation.

We must, in the absence of a showing to the contrary, assume that the Colorado statutes and laws are the same as our own. Under our law, the private property of a citizen cannot be taken to pay the debts of a municipal or public corporation, in which his property is situated. Code, Section 4007; *Davenport v. Peoria Co.*, 17 Iowa, 276. And it is hornbook law that bonds of a city or school district are not liens upon the property of private individuals within the city or district. It is also true that the bonds of a drainage district are not specific liens upon the property within the district. Assessments made to pay the bonds and other charges are liens; but there is no claim here that plaintiff neglected to pay any assessments levied against the land in controversy.

The defendant's objections to plaintiff's title because of the bond issue are without avail.

II. As to the four shares of water company stock, plaintiff offered defendant the money received by him therefor or to procure and assign four new shares in the original company; and defendant made no further objection on that score. Having finally placed his defense on the lien of the irrigation bonds, he cannot now mend his hold. *Nolan v. Foley*, 141 Iowa, 671; *Gilbert v. Mosier*, 11 Iowa, 498; *Donley v. Porter*, 119 Iowa, 542.

III. Defendant's claim that there is no mutuality of contract we do not exactly understand. Of course, there must be mutuality; but that appears beyond all question. Plaintiff had the power to do and offered to perform all that was required of him under the contract. Of course, defendant should

2. SAME: foreign laws: pre-sumption.

3. VENDOR AND VENDEE: objections to title: waiver.

4. SAME: specific performance: liability of guarantor.

not be compelled to take an unmerchantable title, even though plaintiff offered him a warranty deed, but the title was merchantable, and such we think as Johnson agreed to take. At least, plaintiff has met all objections urged by defendant to the title. We are the better satisfied with this conclusion because it does exact justice between the parties, and the result is reached without the violation of any legal or technical rules. The situation and conduct of the parties at and before the making of the contract was proper to be shown in order to properly interpret any doubtful provisions of the contract. When these are taken into account, it is manifest that plaintiff offered to defendant Johnson all he agreed to give, and that for the privilege of holding the title to unproductive land for two or more years he has paid out considerable sums of money. He has given back or offered to give back to defendant Johnson all and more than he received, and has in no manner done anything himself to cloud the title to the land. The irrigation project had been commenced before plaintiff got title to the land, and it was continued while he had it, for the benefit of the land. All assessments which had been levied or were due on account thereof were paid by plaintiff, and he should not be required to pay anything more by reason of the bond issue. The equities are clearly with plaintiff, and the law is not in his way. The judgment against the guarantor was also correct. *Fuller v. Tomlinson*, 58 Iowa, 111; *Hoyt v. Quint*, 105 Iowa, 443. We are not to be understood as holding that assessments for public improvements as for paving and guttering or sidewalks or for drainage improvements are not incumbrances against the property benefited or supposed to be benefited thereby. Upon that proposition we express no opinion. What we do hold is that bonds issued by a municipal or quasi municipal corporation for such improvements are not specific liens or incumbrances against the property to be benefited in such a sense as to require a warrantor of the title to pay his aliquot or proportionate share of such bonds. The decree

seems to be correct in every respect. On account of the nature of the pleadings we have gone beyond the issues and discussed matters presented by the arguments alone, with the result indicated.—*Affirmed.*

B. TAIT, Appellant, v. W. L. CRISSMAN and R. B. REID,
Appellees.

Fraudulent conveyances: ACCOUNTING. Where the interest of the debtor in attached property consisted of a mere option to purchase land and was of no value to the creditor at the time of the attachment, unless he was willing to protect the option against immediate forfeiture by assuming the balance due on the purchase price, which he did not do and the contract was forfeited, an assignment of the contract by the debtor to another was not such a fraud upon the creditor as entitled him to an accounting from the assignee.

Appeal from Linn District Court.—HON. W. N. TREICHLER,
Judge.

THURSDAY, JANUARY 16, 1913.

ACTION by plaintiff as a judgment creditor to set aside an alleged fraudulent conveyance. There was a trial on the merits and a decree dismissing the petition. Plaintiff appeals.—*Affirmed.*

C. D. Harrison and Redmond & Stewart, for appellant.

Crissman, Linville & Churchill and Dawley & Wheeler,
for appellees.

EVANS, J.—In June, 1909, the plaintiff Tait obtained a judgment for about \$3,000 against the defendant Reid in the superior court of Cedar Rapids. Reid was insolvent. Both

parties reside at Cedar Rapids, as does also the defendant Crissman, who is a practicing attorney there. In September, 1909, Reid obtained from one Taylor, also of Cedar Rapids, an option to buy a certain forty-acre tract of land known as Taylor's addition to North Platte, Neb. For such option he paid \$400. The final exercise of the option to buy would require him to pay within sixty days an additional sum of \$12,600. Later this time was extended, and a written contract was entered into containing strict provisions for forfeiture in case of failure to pay the purchase price. It appears that this tract had been duly platted into town lots, but no lots had been sold therefrom, and it continued in use as a field or pasture. Reid immediately went to Nebraska and put the lots on sale on long time and easy payments. He secured a large number of contracts for the sale of the lots totaling from \$12,000 to \$13,000 in amount. The purchasers were persons of small means who made small payments and bound themselves to pay in the future in small installments.

This was the state of affairs in February, 1910, when the plaintiff began an action in the courts of Nebraska on his judgment and levied a writ of attachment upon all the property and garnished various parties as supposed debtors of Reid. This procedure naturally stopped the further progress of the enterprise, though there were many unsold lots. Thereafter Reid came to Cedar Rapids. He was indebted in some amount for services to Crissman and his firm. He conveyed to Crissman all his interest in the Nebraska property, and assigned to him his contract with Taylor. For this transfer there was no special consideration except perhaps the existing indebtedness and a desire on the part of Reid to protect the purchasers from him and a willingness on the part of Crissman to take the risk of the enterprise for the possible profits which it might give him. Crissman intervened forthwith in the Nebraska suit, and the litigation there is still pending. In May, Taylor served notice of forfeiture. Both Tait and Crissman were advised of this notice, and both refused

to perform Reid's contract with Taylor. Taylor declared a forfeiture, and later entered into a similar contract of sale with Crissman alone for a consideration to be paid of \$12,600. Crissman thereupon went to Nebraska and carried on the enterprise. He offered performance of all existing contracts that had been made by Reid. Many of them, however, were abandoned. Many other sales were made by Crissman. He employed Reid to assist in the enterprise at an agreed commission of seven and one-half per cent. He advanced him more or less funds for expenses in advance of commissions earned. Upon this state of affairs plaintiff brought this action in October, 1910. He asked for an accounting from Crissman. He asked and obtained a sweeping temporary injunction. He asked that the transaction between Crissman and Reid be set aside as fraudulent and as done with intent to hinder and delay and defraud creditors, and asked for general equitable relief. The first hearing was had upon motion of defendant to dissolve the temporary injunction. Such injunction being dissolved, a final hearing was had some time later resulting in a decree for the defendant. Plaintiff has appealed both from the order dissolving the temporary injunction and from the final decree, and both features of the case are argued. We shall consider first the merits of the case.

It may well be doubted whether this action can be resolved into anything else than an attempt to establish a lien upon the Nebraska property. It is very clear that no such relief could be awarded, and the plaintiff does not in terms ask it. His theory is that a court of equity may find value in the contracts existing between the parties, and that it may in that way protect the plaintiff by adjudging the defendant Crissman liable to an accounting as for moneys fraudulently received from the plaintiff's debtor. We will not stop now to deal with this particular question. We look first to the question whether the transaction entered into between Reid and Crissman could in any legal sense be deemed a fraud upon the plaintiff as a creditor of an insolvent debtor. It will not

do to say that it was necessarily fraudulent in that Reid thereby disposed of all his property without any consideration, unless it be made to appear also that the contract or right so disposed of was property of some appreciable and available value. It appears from the undisputed testimony that the value of the tract as a whole, at the time of the transactions between Crissman and Reid, was from \$8,000 to \$10,000. This property was incumbered for the purchase money unpaid of \$12,600. It is clear that the only value to be found in Reid's option was the prospective or potential value of the proposed enterprise, which would call for months, and perhaps years, of personal attention, and which might yield large profits or result in considerable loss. If Reid had any prospective profit in the contract before the plaintiff served his attachment, it is manifest from the evidence that he had none afterwards. Plaintiff had already availed himself of his legal remedy against this property by attaching the same. He realized something upon his debt by garnishment in Nebraska. It was after the attachment by plaintiff that Crissman bought. It was not apparent at that time that the purchase by Crissman could operate to any disadvantage to the plaintiff. It appears, however, that in the later proceedings in the Nebraska court the plaintiff's attachment was discharged. For what reason does not appear here, nor would it avail anything if it did. We must take the situation as it was when Crissman took the enterprise.

It is clear from the record before us that the interest of Reid in the Nebraska property at the time of plaintiff's attachment and afterwards was of no value, and that the plaintiff could have realized nothing thereby by means of any process unless he were willing to protect Reid's option contract against immediate forfeiture by assuming the balance of the purchase price. This the plaintiff was not willing to do, and the contract was forfeited. Crissman entered into a new contract with Taylor and is bound to Taylor for the purchase price. Taylor was not affected by the attachment. He had a right to

declare a forfeiture. He did declare it. He then bound himself to convey by warranty deed to Crissman. No right of Tait was violated by these acts of Taylor. And, if there were, Taylor is not made a party to the suit. It seems clear to us, therefore, that the assignment of the contract by Reid to Crissman under the circumstances shown was not a fraud upon Tait in any legal sense.

This was the view of the trial court, and its decree is accordingly *Affirmed*.

LIZZIE J. POST, Appellee, v. CITY OF DUBUQUE, Appellant.

New trial: DISCRETION: REVIEW ON APPEAL. Trial courts have a large discretion in the matter of granting new trials, which must be exercised, however, with care and judgment, and in the light of all the facts and circumstances of each particular case; but unless it fairly appears that there has been an abuse of that discretion the action of the trial court in granting a new trial will not be interfered with on appeal.

Appeal from Dubuque District Court.—HON. M. C. MATTHEWS, Judge.

THURSDAY, JANUARY 16, 1913.

ACTION to recover damages claimed to have been sustained by a fall on a sidewalk. Trial to a jury. Verdict for defendant. Motion for new trial. Motion sustained, and defendant appeals.—*Affirmed*.

Geo. T. Lyon and E. H. Willging, for appellant.

Fitzpatrick & Frantzen, for appellee.

GAYNOR, J.—The plaintiff brings this action to recover damages of the defendant on account of certain injuries

claimed to have been sustained by her, and predicates her right to recover therefor on what she claims to be the negligence of the defendant; and the acts, or omissions to act, on the part of the defendant, which she says constitutes the negligence of which she complains, and which she says were the proximate cause of her injury, are:

That the defendant is a city, incorporated and existing under and by virtue of a special act of the Legislature of the state of Iowa, and by said act it is made the duty of the defendant to keep in repair the sidewalks within its limits, and to keep the same, at all times, in a reasonably safe condition for persons traveling over and upon the same. That South Locust street is one of the prominent streets in the city of Dubuque, and at the place hereinafter named is traveled upon by a large number of persons at all times. That it is macadamized and guttered, and has a sidewalk running along its westerly side, and this has been its condition for many years. That there was put down a plank piece of sidewalk on the westerly side of said South Locust street and opposite the southerly end of the building known as No. 305 South Locust street. That this piece of sidewalk was put down more than fifteen years prior to the time of plaintiff's injury. That said sidewalk was constructed of wood and pine planks nailed to stringers underneath the same, which said stringers were laid upon the ground. That said sidewalk, by reason of age and use, had become worn out and out of repair; the stringers and boards were decayed, rotten, and in an unsafe condition. That the boards in said walk were loose, the spikes were protruding from the same, the stringers were rotten and unable to hold the nails to keep the planks or boards fastened thereon, and said boards were thrown on said walk in a loose manner, and said walk became and was in such condition that it was dangerous to persons traveling over and along the same. That said sidewalk, at the point named, was in such dangerous and defective condition as herein described for a long period of time, to wit, more than six months prior to the 3d day of October, 1908. That defendant had notice of this condition for a long time prior to the injury, or that it had existed for such a length of time in said condition before the injury, that it should have

known. That on the 3d day of October, 1908, this plaintiff, at the hour of about 5 o'clock in the afternoon of said day, was returning to her home on Southern avenue, walking in a southerly direction on said sidewalk, and at the point named, to wit, near No. 305 South Locust street, and in company with another person, and while in the exercise of ordinary care, prudence, and caution, and without any fault or negligence upon her part, when at or near the point named, the person with whom plaintiff was walking stepped upon the end of one of the loose planks so lying upon said sidewalk in an unsafe and insecure condition, and said plank flew up at the end and just in front of the plaintiff, causing the foot or feet of said plaintiff to catch in said plank and strike against the same and throw her violently forward onto said sidewalk. That by said fall she was greatly injured. That the negligence of this defendant was the proximate cause of her injury, without any negligence on her part contributing thereto.

All this defendant denies in its answer.

The case was tried to a jury and a verdict rendered for defendant. After the return of the verdict, the plaintiff moved for a new trial, assigning thirty-four distinct grounds of error, among which plaintiff urges error, both in the admission and in the exclusion of evidence, in the instructions given to the jury, and in the misconduct of one of the jurors. The motion was submitted to the court and sustained generally. Nothing in the record shows the ground or grounds on which it was sustained. From this action of the court in sustaining the motion, this appeal was taken by defendant.

We have examined the record in this case, not for the purpose of ascertaining and determining whether this case should or should not be reversed, had the court overruled plaintiff's motion, but simply to ascertain and determine whether the trial court abused its discretion in sustaining the motion. It has been wisely held that a large discretion is lodged in the trial court in granting new trials. That this means a sound judicial discretion, to be exercised with care, judgment, and sound discretion in the light of all the evidence and all the

facts in the particular case appearing in the trial, is conceded. That courts have no right to set aside the verdict of a jury through mere caprice or whim, or to reweigh the evidence submitted, or sit in judgment on the credibility of witnesses, is too well recognized to need argument. It does not appear that the court did this, or attempted to do this.

The trial court had, and always has, an opportunity to observe the trial as it proceeded step by step, the parties, their counsel, the witnesses and the jury, that this court has not and can never have, and many things occur and are known to that court that may, and often do, convince the court that a fair and impartial trial has not been had. And yet these things, so observed, may not, and many times cannot, be made to appear in the record. There is nothing in the record in this case, so far as the record itself offers suggestion, nothing in the attitude of the court toward the counsel or the parties during the trial or in the final submission of the case, that indicates in the least degree that the court was not, at all times, in a frame of mind that left the court free to seek for and do impartial justice. Indeed, the record is most free from any suggestion of bias or prejudice on the part of the presiding judge. We have frequently held, and now hold, that such an order as is here appealed from will not be reversed, unless it affirmatively appears that the trial judge has abused his discretion in granting a new trial. See *Holland v. Kelly*, 149 Iowa, 391, and cases cited.

We find no evidence of an abuse of the discretion vested in the trial court, and the case is *Affirmed*.

M. E. REUSCH, Appellant, v. ALFRED LOSERTH and Certain Property.

Intoxicating liquors: NUISANCE: INJUNCTION: ABATEMENT OF ACTION. A suit to enjoin a liquor nuisance may be instituted and maintained by any citizen of the county, and it will not be

abated simply because plaintiff's attorney employed detectives, who were paid by an organization not incorporated in that county, to obtain evidence against defendant, and because plaintiff's attorney, a non-resident of the county, received the fees collected of defendants in that class of actions.

Same: MULCT SALOON: SINGLE ROOM. A saloon room with a street
2 entrance and a small addition on the rear opening into the main room, and used in connection therewith as a toilet room, and having an outside window large enough to admit a person, is not in compliance with the statute providing that the business shall be carried on in a single room, having but one entrance or exit.

Same: USE OF FURNITURE: EVIDENCE. The evidence in this action
3 is held to show that defendant violated the law by keeping a chair in the saloon room and permitting its use therein by a customer.

Same: TAXATION OF COSTS. In the absence of a showing that a suit
4 to restrain a liquor nuisance was brought maliciously and without probable cause the costs should not be taxed to plaintiff.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

THURSDAY, JANUARY 16, 1913.

PLAINTIFF brought this action to enjoin an alleged liquor nuisance. After trial, plaintiff's petition was dismissed on the merits, and the costs taxed to plaintiff. The plaintiff appeals.—*Reversed.*

M. S. Odle, for appellant.

Poor & Poor and *C. H. Mohland*, for appellees.

PRESTON, J.—Plaintiff's petition alleged that he was a citizen of Des Moines county, and stated in a general way that defendant was illegally selling and keeping for sale intoxicating liquors in his property in the city of Burlington, which property was described. Defendant's motion for a

more specific statement was sustained, and plaintiff was required to state wherein it was claimed defendant was violating the law. Plaintiff amended, and charged, in substance, the making of sales from day to day in the place, and that defendant permitted benches and chairs in front of the bar, and that the business was not conducted in a single room having but one entrance and exit, and alleging some other matters of which there is no evidence. Defendant in his answer alleged that there had been a written statement of general consent to the sale of liquor in said city, which petition had been held sufficient by the board of supervisors, that defendant had complied with the provisions of the mulct law, and pleaded these facts in bar of this action; denied that he had in any wise violated the law as alleged. By an amendment to his answer, the defendant set up a plea in abatement to this effect: That whilst he admits that M. E. Reusch is a resident of Des Moines county, and that he is the nominal plaintiff, defendant alleges that this suit is not being maintained and prosecuted by said Reusch; that it was instituted, and is being maintained, controlled, and prosecuted by other persons, and an association of persons, none of whom are residents or citizens of said county.

I. The evidence shows that plaintiff's attorney employed detectives, who were paid by the Anti-Saloon League, to obtain evidence as a basis for the prosecution of a large number of such cases in Burlington, and that he received all the fees made off defendants; that he is not a citizen of Des Moines county, and that the Anti-Saloon League is not incorporated in said county. This is, in substance, the basis of defendant's claim that the suit should abate, because it is not, as he claims, being prosecuted and maintained by the real party in interest. The statute does provide as to actions generally that they must be prosecuted by the real party in interest, but one of the exceptions to this statute is where a party is expressly authorized by statute to sue. Code, section

1. INTOXICATING
LIQUORS: nul-
lance: injunc-
tion: abate-
ment of ac-
tion.

3459. Section 2406 expressly authorizes a citizen of the county to institute and maintain an action of this kind. Plaintiff was a citizen of the county, and he has not withdrawn from the case. We think there is no merit in this claim of defendant.

II. The undisputed evidence shows that at the rear of the saloon room a shed, or toilet room has been built, the size of which is about five by six feet. There is a door between this

room and the saloon room. There is an outside window three feet square in this shed or toilet room, fastened by a nail, which is loose.

2. SAME: mulct
saloon: single
room.

Defendant's witness Hartman says a person can climb out of the window. There was an outside door to the street in the front part of the saloon. No liquors were sold or stored in the toilet room. The statute provides that the business shall be carried on in a single room having but one entrance or exit. This requirement has been strictly applied. *State v. Roney*, 133 Iowa, 416. It was said in *State v. Bussamus*, 108 Iowa, 11, that this statute excludes an entrance or exit from or into any other room. Had the Legislature intended the use of a room, large or small, in which to store liquors, or for any other purpose, in connection with, and opening into the single room, this would have been mentioned, rather than guarded against. It is the existence of an entrance or exit other than that allowed which is condemned, and not its use for any particular purpose. *State v. Gifford*, 111 Iowa, 648. This is not like the ice box case, where the ice box was kept entirely in the one room. *State v. Donahue*, 120 Iowa, 154; *Tuttle v. Carraher*, 158 Iowa, 200, decided at this term.

III. The evidence is substantially without conflict that defendant kept, or permitted, a chair for the use of customers in front of the bar. One Tuttle, a witness for plaintiff, testi-

fied that on October 3d he visited defendant's saloon, and bought beer and ate some lunch there; that there was a chair in front of the bar in the room; that there was a man sitting in the chair who was not the proprietor, and not the man who waited

3. SAME: use of
furniture: evi-
dence.

on the witness at the bar; that he judged the man to be a customer; that it was an ordinary kitchen chair, and was about the middle of the room in front of the bar; that he also visited the saloon on October 24th. Witness Bartlett testified for plaintiff that he visited defendant's saloon on October 24, 1910, and saw Mr. Tuttle drinking and saw him eat the lunch, saw a man sitting in the chair, and that the chair was in front of the bar. A witness for defendant testified that he had been in defendant's saloon and passed by it often, that he never saw any benches or chairs in the place, but he does not fix any date or pretend to say he was in or by the place on October 3d and 24th, the dates testified to by the plaintiff's two witnesses. There can be no question as to the chair being in the saloon and used contrary to law. Neither defendant nor his employees deny, or explain, in reference to the chair.

IV. The record does not show that the action was brought maliciously, or that it was brought without probable cause, so that the costs should not have been taxed to plaintiff. Code, section 2412. There should have been a decree
4. SAME: taxation of costs. for plaintiff. The trial court erred in dismissing plaintiff's petition. The cause is reversed, and remanded for a decree in harmony with this opinion, or plaintiff may at his election, have a decree in this court.—
Reversed.

ELLEN J. TUCKER, Appellee, v. EMANUEL W. GLEW, et al.,
Appellants.

Reformation of instruments: BURDEN OF PROOF. One seeking to
1 reform an alleged misdescription in a deed has the burden of showing the execution and delivery of the instrument, and of establishing the alleged mistake by clear and satisfactory evidence.

Conveyances: DELIVERY: PRESUMPTION. The due execution and
2 recording of an instrument raises a presumption of its delivery not later than the date of its acknowledgement, but this presumption is not conclusive and it may be overcome.

Same: RECITAL OF CONSIDERATION: EFFECT. A conveyance which
3 recites a valuable consideration as having been paid cannot be
converted into a trust or made testamentary in character by
showing that there was no consideration.

Reformation of instruments: EVIDENCE. In this action to reform a
4 deed, the evidence is held to show a technical mistake in the
description of the property, which was the only property the
grantor had, and to justify a reformation of the instrument.

Appeal from Dubuque District Court.—HON. ROBERT BONSON,
Judge.

TUESDAY, JANUARY 21, 1913.

ACTION for the reformation of a deed made by William W. Haller, widower, during his lifetime to the plaintiff, and to quiet her title to the property, the description of which she asked to have inserted in the deed. Defendants denied the execution or delivery of any deed by Haller during his lifetime, denied that there was any consideration for the deed, and further alleged that Haller died seised of the real estate in controversy, and that they, with the plaintiff, are his children and heirs at law and the owners thereof, and they asked that plaintiff's petition be dismissed. On the issues joined the case was tried to the court, resulting in a decree for the plaintiff, and defendants appeal.—*Affirmed.*

S. B. Lattner and E. E. Bowen, for appellants.

Hurd, Lenehan & Kiesel, for appellee.

DEEMER, J.—William W. Haller was at one time the owner of the property in controversy, which is described as follows:

Lot 2 of Walker's addition to the town of Farley, lots 3 and 6 of a Subd. of part of the S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 7 and the E. $\frac{1}{2}$ of lot 2 of a Subd. of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 7, Twp. 88 N., R. 1 W. of 5th P. M.

This was all the property, real or personal, owned by

him on the 14th day of November, 1910. On that date he appears to have executed a deed to plaintiff of certain property, which he described as follows:

The E. $\frac{1}{2}$ of lot 2 of Lawrence McGuigan's Subd., also lot 3 and the N. $\frac{1}{2}$ of lot 6 and the S. $\frac{1}{2}$ of lot 6 of Walker's Subd. and lot No. 2 of Walker's Add. to Farley, situate in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 7, Twp. 88 N., R. 1 W. of the 5th P. M.

It is alleged in the petition that:

The land described in said deed was and is identically the same as the land owned by the said Wm. W. Haller in his lifetime, and intended to be conveyed by said deed of conveyance to this plaintiff; that the E. $\frac{1}{2}$ of lot 2 of Lawrence McGuigan's subdivision is the same lot as the E. $\frac{1}{2}$ of lot 2 of a subdivision of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 7, and lots 3 and 6, described in said deed of Walker's subdivision, are the same as lots 3 and 6 of the subdivision of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 7, and lot 2 of Walker's addition to Farley is a correct description of said lot 2 owned by the said Wm. W. Haller in his lifetime, and as situated in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 7; that some question having arisen as to the identity of said description of real estate in the deed of conveyance from said Wm. W. Haller in his lifetime to plaintiff with the lots in the subdivision of parts of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 7 and the S. $\frac{1}{2}$ of the S. W. of the N. E. of section 7, as hereinbefore described, plaintiff avers the identity of said descriptions: and that whatever technical difference there was or is in the same the land described in the said deed of Wm. W. Haller to plaintiff was the land owned by him in said section 7, and none other, was the homestead of the said Wm. W. Haller in his lifetime, and was intended by the conveyance to this plaintiff to be conveyed by the deed aforesaid.

I. The deed to which we have referred purports to have been signed on the 14th day of November, 1901, and it was acknowledged by a notary on that day, although it was not filed for record until the 11th day of November, 1907. It recites a consideration of \$2,500 in hand paid by plaintiff, and contains

1. REFORMATION
OF INSTRU-
MENTS: bur-
den of proof.

full covenants of warranty. Defendants deny the execution or delivery of the deed, and aver that no consideration ever passed for the same. They further say that no mistake is shown in the description by that quantity of testimony required, and claim that most, if not all, of the testimony offered by plaintiff to prove the alleged mistake was incompetent, and the witnesses incompetent, under section 4604 of the Code. The burden, of course, is upon plaintiff to show the execution and delivery of the deed, and also to prove by clear and satisfactory testimony the alleged mistake.

But having shown a duly executed deed and produced evidence of the recordation thereof, presumption of delivery arises; and this delivery not later than the acknowledgment of the instrument. *McGee v. Allison*, 94 Iowa, 531; *Robinson v. Gould*, 26 Iowa, 89; *Nowlen v. Nowlen*, 122 Iowa, 542, and cases cited. Of course, nondelivery may be shown; for the presumption is not conclusive. The other testimony, instead of negating the presumption, tends to support it; and there is no difficulty in finding a delivery of the deed.

II. A consideration is presumed; but were that not so the deed cannot be defeated by showing want of consideration. It recites a valuable consideration in hand paid, and cannot be converted into a trust or made testamentary in character by a showing of no consideration. This rule is so familiar that no cases need be cited in support thereof.

III. The burden is upon plaintiff to show a misdescription of the property by competent testimony and from competent witnesses; and this, we think, she did. That deceased intended his deed to have some effect, we must assume. He had but the one piece of property, and this was his "home place." He frequently spoke of having deeded this home place to plaintiff. These declarations he made to perfectly competent witnesses. Again, in December of 1905, he attempted to make a will, and

2. CONVEYANCES :
delivery : pre-
sumption.

8. SAME : recital
of considera-
tion : effect.

4. REFORMATION
OF INSTRU-
MENTS : evi-
dence.

in this he said: "What remains aside from my homestead which I have deeded to my youngest daughter, Ellen J. Tucker, my little dab of money which is left after the funeral expenses are paid, \$300.00 must be paid to Alta Glew for her mother's share." He also gave reasons for deeding the land to plaintiff; and on the whole record it is reasonably clear that he made a technical mistake in the description, and that the deed was correctly reformed as prayed.

No error appears, and the decree must be, and it is, *Affirmed.*

JOHN THOMPSON V. CHICAGO & NORTHWESTERN RAILWAY
COMPANY, Appellant.

Railways: TRANSPORTATION OF LIVE STOCK: NEGLIGENCE: PLEADINGS:

1 **EVIDENCE.** Where the plaintiff in an action for negligence in the transportation of live stock made no general allegations concerning the condition of the stock when delivered to the defendant, and when received at its destination, but specifically alleged particular acts of negligence, his recovery is dependent upon proof of the particular acts. In this action it was alleged that by switching the car in a negligent manner the horses were thrown down and one was so injured as to cause its death. *Held*, that the evidence of the negligence charged was sufficient to take the issue to the jury.

Same: NEGLIGENCE: EVIDENCE. The fact that a shipper of stock
2 accompanies the same and undertakes to look after it in a limited way does not relieve the carrier of the duty to use due care in handling the car. In this action the question of defendant's negligence in handling the car was for the jury.

Same: Evidence of experts that one of the horses was incurably sick
3 at the time of the injury was not conclusive that its death was not caused by the negligent handling of the car, where there was also evidence that the animal was well before the accident, and that after being thrown down and trampled upon by other horses it was thereafter sick until it died; but the question of the cause of its death was for the jury.

Same: INSTRUCTIONS. The mere fact that a veterinary surgeon might
4 have had another and better chance of saving an animal injured
while en route would not of itself render the carrier liable for its
death; and refusal of an instruction to that effect, of which there
was no evidence, was proper, even though correct in the abstract.

New trial: MISCONDUCT IN ARGUMENT. The improper remark of
5 plaintiff's counsel in his closing argument, that defendant had
brought a large number of unnecessary witnesses and that the
costs would amount to several hundred dollars, and for that rea-
son a verdict should be returned for plaintiff, did not require a
reversal, where, upon objection counsel withdrew the remark, though
still insisting that large costs had been needlessly incurred, and
the court immediately directed the jury not to consider anything
that had been said about costs.

Appeal from Jones District Court.—HON. W. M. TRIECHLER,
Judge.

TUESDAY, JANUARY 21, 1913.

ACTION for damages resulting in judgment against
defendant, from which it appeals.—*Affirmed.*

Clifford B. Paul and James C. Davis, George E. Hise and
A. A. McLaughlin, for appellant.

Herrick, Cash & Rhinehart, for appellee.

LADD, J.—On March 16, 1910, plaintiff loaded a box car
with farm implements, household goods, and other articles
in one end and four horses in the other. The horses were
tied to a scantling spiked to the side of the car, and a plank,
two by eight inches, was fastened across to cleats on either side
next to the one toward the center of the car. Also boards
were nailed across to hold the property at the other end,
and in the center there was a sanitary cot. This car was
furnished by defendant, and by it transported from Chicago,
Ill., to Onslow, Iowa. The petition alleged that by switch-

ing the car in a negligent manner the horses were thrown down, and the mare on the inside so injured as to cause her death. Appellant contends that the evidence was not such as to warrant a finding that the cars were roughly handled, or that the mare was injured thereby, or that, if injured, this was the cause of her death. The plaintiff testified that some time after the train started he went to sleep on the cot, and later in the night the car was side-tracked, and "was switched or thrown against something. It came in with a sudden crash that knocked me off the cot I was lying on. The horses were bursted down from the plank I had against the horses that was knocked down, and fell against the furniture. . . . The horses were all down, and the first one next to the doorway lying on the floor and the biggest horse on top of her. . . . I ventured to go to the other end. . . . Managed to get the first horse up, and then managed to get the other horses up until I got to the mare. She was shoved in with her shoulders against the car, and I could not get her up for a while, but finally I got her up on her feet, and she moaned and groaned; but I thought she would be all right." He testified further that after starting again the mare "dropped her head and commenced to vomit, and kept vomiting from that place on until we got to Clinton." On reaching that place the horses were unloaded, and the mare treated by a veterinary surgeon. The following day she reached Onslow, where she died three days later. He testified that the mare was "in perfect health and feeling well and was playful when loaded, and was not injured at that time." The evidence on the part of defendant tended to show that the car was not roughly handled. The proprietor of the boarding stable at which plaintiff had kept the mare a few days before shipping testified that when taken away she was running at the nose a little and did not eat very well; "acted kind of dull." The veterinary who treated the mare at Clinton was of opinion that she was afflicted with lung fever, which she had had for three or four days; that she died in consequence

thereof and not because of any injury described by plaintiff; and that a horse never vomits, except when the stomach is punctured, in which event death results within a half day; and this testimony was somewhat corroborated by another veterinary in response to hypothetical questions.

It will be observed that the petition contains no general allegation concerning the condition of the animal when delivered to the carrier at the initial point of shipment, and when received from it at the destination, as did that considered in *Swiney v. Express Co.*, 144 Iowa, 342, and *Gilbert Bros. v. Railway*, 156 Iowa, 440, but specifically alleged the particular negligence of which complaint was made, and no more. This, then, must have been established in order to maintain the action. *Stone v. Railway*, 149 Iowa, 240.

The evidence was sufficient to carry this issue to the jury. The horses were standing and apparently well when plaintiff went to sleep, and the household goods were as placed. He was awakened by a bump or sudden crash of the car, which threw him to the floor, his lantern from the nail keg, and upon arising he discovered the horses down, the scantling torn loose at one end, and the boards, holding the goods up, loose. Of course, all this might have resulted from other causes of which there was no evidence, and counsel have supposed some; but the natural inference is that it was the result of the bump or crash described by the witness, which would not ordinarily have occurred in the careful handling of the car. Having traced the injury as a sequence to the rough handling of the car, it is to be inferred that this was due to some neglect on the part of the defendant. The jury might have found that the horses were in good condition when loaded, that the plaintiff had done what he undertook, and that they were not injured in connection with anything he was to do or did, and yet that when he was awakened by the crash, and being thrown from the cot, one of them was so injured that she subsequently died; and if they did so find the deduction naturally to be

1. RAILWAYS:
transportation
of live stock:
negligence:
pleadings: evi-
dence.

drawn therefrom was the loss of the mare as the result of negligence on the part of the defendant in handling the cars

The defendant was not relieved from meeting the inference that the injury was the result of some neglect on its part precisely as though the shipper had not accompanied the

2. SAME: negligence: evidence.

stock. The shipper undertook to see to his stock only in a limited way. The defendant continued in control of all the instrumentalities of transportation. With these it was familiar, and there was precisely the same reason for inferring its negligence, as alleged, from the circumstances disclosed, upon a showing that the mare, though injured in transit, was not injured in connection with what the shipper undertook to do or did, as though he had not accompanied the stock at all. See *Mosteller v. Railway*, 153 Iowa, 390. Whether defendant was negligent in the rough handling of the cars was for the jury to determine.

II. The veterinary who examined the mare at Clinton testified that she had pneumonia and could not recover, and that she had been afflicted therewith three or four days pre-

3. SAME.

vious, and that this was not caused by the fall of the large horse lying on her. The opinion of another veterinary, in response to a hypothetical question, tended to sustain this view, as did the testimony of the keeper of the boarding stable in Chicago. But the jury was not bound to accept these opinions. Experience has demonstrated that the conclusions of experts are not infallible. Their evidence is subject to infirmities peculiar to that given by other witnesses.

The mere fact of the animal being sick raised no inference that this was in consequence of any negligence on the part of defendant (*Colsch v. Railway*, 149 Iowa, 176;) but the facts, if found, that she was well immediately before the so-called crash and the precipitation of the large horse, weighing 1,700 or 1,800 pounds, on her, and that upon being helped up she groaned and was sick thereafter until

she died, did warrant the inference that she then received injuries which caused her death. Such is the natural conclusion to be drawn from the state of facts testified to by plaintiff. It is said that, as the veterinaries declared a horse could vomit only when the stomach is punctured, and in that event could not survive more than ten or twelve hours, it must have been found the mare was not sick. But this merely put in issue the testimony of plaintiff that she actually did vomit. Moreover, plaintiff may have been mistaken in thinking that the emission was from the mouth instead of the nostrils, or the jury might have concluded that she was sick, and yet have rejected plaintiff's testimony concerning this matter. But the veterinary was of opinion that she had pneumonia, and was afflicted with that disease before loaded in the car, and that her death was due to this cause and not to injuries she might have received in the car; and appellant's counsel seem to regard this evidence as conclusive. Enough has been said to indicate that this is not so, but that it was for the jury to say whether the death of the mare was in consequence of injury suffered in the car, or pneumonia, independent of such injury.

III. Instructions 2 and 3, requested, were included in those given. There was no error in refusing the ninth instruction, because issue as to negligent delay was not submitted to the jury. The fifteenth instruction advising the jury of the duty of plaintiff to notify defendant's employees if assistance in the way of a veterinary were needed on the way to Clinton, and of the employees to set the car out to enable him to avail himself of such services, if required, and "that the mere fact that a veterinarian might have had a better opportunity of saving said mare if he had been called sooner will not make the defendant liable." The instruction was correct enough in the abstract (*Peck v. Railway*, 138 Iowa, 187; *Jeffries v. Railway*, 88 Neb. 268, [129 N. W. 273];) but there was no evidence tending to show that the result might have been different had a veterinary been called sooner, nor that plaintiff was aware of

4. SAME: instructions.

the serious condition of the mare (he having testified that he thought she would be all right), nor that, had the car been set out, the services of a veterinary could reasonably have been obtained. The matter was not touched in the evidence, and we are of opinion that in submitting the issue as to whether plaintiff was guilty of contributory negligence in what he should have done in the emergency occurring in the night was sufficiently brought to the attention of the jury. That issue was for the jury, as were the others discussed; and the instructions were accurate, clear, and definitely limited consideration to the issues involved.

IV. In the course of the closing argument counsel for plaintiff criticised defendant for bringing a large number of witnesses from Chicago and elsewhere to testify in the case,

5. NEW TRIAL: misconduct in argument. and argued that the costs would amount to \$600 or \$700, largely for unnecessary witnesses, and that jury should return a verdict

against defendant on this account. On objection, counsel withdrew what was said, but insisted that several hundred dollars of useless costs had been incurred, and the court immediately instructed the jury "not to consider at all anything said about the matter of costs. You are to ignore it and pay no attention to it. You have nothing to do with it, but are to determine the case solely on the evidence and instructions that will be given you on the law." In view of this record, it cannot well be said that the antidote was not effectual in removing the poison injected by the improper remarks. *Bettis v. Railway*, 131 Iowa, 46; *Mackerall v. Railway*, 111 Iowa, 547; *Lindsay v. Des Moines*, 74 Iowa, 111.

The evidence was such as fairly to carry the case to the jury; and, though we might not have reached the conclusion the jury did, no ground for disturbing the verdict appears in the record.—*Affirmed*.

In re Guardianship of THOS. J. DECK.

Guardianship: ALLOWANCE OF ATTORNEY'S FEES. The allowance of
1 \$35 to an attorney appointed by the court to resist objections to
the final report of a guardian for an incompetent, who was em-
ployed at least a day in the trial of the objections, was not
excessive.

Same: Where a temporary guardian has been appointed, followed by
2 a permanent appointment, the expenses of guardianship, includ-
ing expenses incurred by the guardian for attorney's fees in pro-
curing the permanent appointment, should be paid from the ward's
estate, and may be allowed in the guardianship proceedings.

Same: EXPENSES OF ESTATE: ALLOWANCE. Where a temporary
3 guardian has been obliged to employ counsel to get possession
of his ward's property, and to maintain himself in office, he is
entitled to an allowance for attorney's fees; and all expenses
incurred in procuring an order for the preservation of the estate
should be paid out of the estate.

Same: ATTORNEY'S FEES: LIEN. While in the first instance coun-
4 sel are generally employed by the applicant for the appointment
of a permanent guardian, still where the appointment was con-
tested an allowance of fees may be made to the guardian, where
he afterward attended to the matter, and counsel made his claim
against him and not against the applicant; and the attorney has
an equitable lien for his services against funds of the estate
recovered or preserved through his efforts.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

WEDNESDAY, JANUARY 22, 1913.

THIS is a contest over the final report of Thos. L. Wolfe,
temporary guardian of one Thos. J. Deck. Certain heirs of
the ward, now deceased, filed objections to the report, but

these objections were each and all overruled, and objectors appeal.—*Affirmed.*

F. T. Davis and Jamison, Smyth & Hann, for appellants.

E. A. Johnson, for appellees.

DEEMER, J.—In November of the year 1908, Sarah J. Kafer, a daughter of Thos. J. Deck, filed an application for the appointment of a guardian for the said Deck and of his property. As the application was verified and prayed for the appointment of a temporary guardian, the trial judge appointed Dr. T. L. Wolfe as such guardian of the property of Deck, and, upon the said guardian's filing bond in the sum of \$2,500, letters of guardianship were issued, and he commenced to serve in that capacity on the 1st day of December, 1908. He immediately took possession of the property of his ward, which consisted of eighty acres of land, worth about \$12,000, and personal property amounting to something over \$2,000. Trial was had upon the issue as to the appointment of a permanent guardian, and during its progress, which lasted eight days, the temporary guardian was present, giving information to counsel, securing witnesses, and looking after the case. As a result of the contest, Deck was found to be unsound of mind and incapable of looking after his property, and on March 6, 1909, Wolfe was appointed permanent guardian and duly qualified as such, giving bond in the sum of \$4,000. As such permanent guardian he continued to act until August 5, 1909, when his ward died. In the meantime he had cared for the property of his ward, and upon the death of said ward he filed a final report as guardian, and in this report showed that he had something like \$1,874 in cash arising out of rentals of the land, interest on a certificate of deposit, and from a collection made from one Kafer. He also charged himself with a certificate of deposit amounting to \$1,500. He asked credit for \$29.20 paid

to and on behalf of his ward, also an allowance of \$150 for his compensation and expenses as guardian, and a further allowance of \$678.10 to pay counsel for conducting the trial of the main case, leaving a balance in his hands of \$1,016.98. He further asked that an allowance of \$35 be made to his counsel, E. A. Johnson, as compensation for his services in preparing his final report and representing him on the hearing of the objections thereto. Some of the heirs of the deceased appeared and filed objections to the report. They expressly stated, however, that they did not object to the amount of the attorney's fees charged and claimed by the guardian, but they denied his right to any allowance therefor, and also denied the right of the guardian to compensation. The trial court allowed the attorney's fees, and also taxed in favor of E. A. Johnson a fee of \$35 for representing the guardian upon the hearing on the objections to the report, and it also allowed the guardian for his services the sum of \$135.80, being the amount claimed by him, less the sum of \$14.20, which was taxed as witness fees in the main case in favor of the guardian. The appeal is from this order.

As the value of the services performed by the various attorneys in the main case are not in dispute, we shall have no occasion to review that matter, and the only question to be considered in this connection is whether or not the trial court had authority to allow attorney's fees in any amount to said guardian. It seems that, when objections were filed to his final report, the court appointed E. A. Johnson to appear as an attorney for the guardian in resisting the objections and sustaining the report. For these services Johnson was allowed the sum of \$35, and it is now said that this allowance was excessive. The attorney was engaged at least one day on the trial of the objections, and, as the trial court was vested with considerable discretion as to the amount to be allowed, we are not prepared to say that the sum awarded should be in any manner reduced. The amount awarded the guardian

1. GUARDIANSHIP:
allowance of
attorneys fees.

is also challenged. No question is raised regarding his right to some compensation, but the amount allowed is said to be excessive. The record shows that the guardian was hampered and interfered with in obtaining the possession of the property of his ward; that he had to bring an action to recover some of it; that he was required to give the matter constant attention for some time on account of the pertinacity of the children of his ward, and complaints as to the way the ward was being treated; that he gave two bonds, one for \$2,500 and the other for \$4,000; and that he was present during the final trial and assisted in securing the witnesses. The allowance to the guardian for compensation does not appear to be so excessive as to justify our interference. The main item objected to is that for attorneys' fees in conducting the main trial, but the objection here is not to the amount, but to the right to tax any fees at all against the property of the ward. The main point, as we understand it, is that these fees should be paid by the party who instituted the proceeding and originally employed counsel, to wit, Sarah J. Kafer.

While it may be that the party instituting such an action may be held liable for attorneys' fees in the event suit fails, we think it clear that if a temporary appointment is made, and this is followed by the appointment of a permanent guardian, the expenses of the guardianship, including fees to counsel in prosecuting the action to a final conclusion, should ultimately come out of the ward's property and be charged against the funds coming into the guardian's hands. Such seems to be the rule everywhere recognized. See *In re Estate of Walker*, 150 Iowa, 284. The only difficulty in the past has been to determine whether such fees should come out of the ward's estate in the event of his death and against his administrator, or whether they should be allowed in the guardianship proceedings. In actual practice this makes but little difference, for in either case the allowance is by the same judge and in the same court. But we have recently held that such fees are properly al-

lowed in the guardianship proceedings. *In re Walker*, 150 Iowa, 284. Supplemental opinion on rehearing.

Where a temporary guardian is appointed by order of court, and as such is obliged to employ counsel to get possession of property and to maintain himself,
 3. SAME: expenses of estate: allowance. there can be no doubt, we think, of his right to have an allowance made for attorneys' fees, especially where the guardianship is made permanent, as in this case.

And all expenses incurred in securing an order for the preservation of an incompetent's estate should be paid out of that estate, for the plain reason that the court takes hold of it in order to protect it from dissipation and waste.

True, counsel are generally employed in the first instance by the applicant and compensation is awarded the applicant for expenses incurred. But as the
 4. SAME: attorneys fees: lien. guardian undertook to look after the matter, and counsel have made their claim against the guardian and have made no charge against the original applicant, no reason appears why the allowance should not be made to and in the name of the guardian, even though he did not employ counsel in the first instance.

An attorney employed in such a case doubtless has an equitable lien or claim against the funds which he, by his efforts, succeeds in securing and preserving, and it is not very material as to how this is worked out.

No error appears, and the order must in all respects be, and it is, *Affirmed*.

WILLIAM O'NEIL, by his next friend DENNIS O'NEIL, Appellant, v. T. M. REDFIELD, Appellee.

Appeal: FINDINGS OF FACT: REVIEW. Where the evidence is in such
 1 conflict as to require submission of the issue to the jury, its finding will not be reversed on appeal.

Negligence: AUTOMOBILE ACCIDENT: EVIDENCE. In an action for
2 injury caused by the alleged negligent driving of an automobile
by defendant, in which plaintiff claimed that the machine was
driven against him, which was denied by defendant upon the trial,
a letter written by defendant concerning the accident and con-
taining statements from which it could be inferred that his car
did strike the plaintiff, was admissible; as plaintiff was entitled to
all evidence tending to prove the truth of his claim.

Same: INSTRUCTION. Where several grounds of negligence are al-
3 leged, either of which if established will entitle plaintiff to
recover, an instruction requiring the establishment of negligence
in all the particulars charged was erroneous.

Same: The operation of an automobile at a rate of speed exceeding
4 the statutory limit is *per se* negligence, and an instruction that if
defendant was operating his machine at a rate of speed exceed-
ing the lawful limit, the jury would be authorized to find defend-
ant negligent, was objectionable as leaving the jury to exercise
some discretion in finding negligence from such a state of facts.

Appeal from Dallas District Court.—HON. J. H. APPLE-
GATE, Judge.

WEDNESDAY, JANUARY 22, 1913.

ACTION at law to recover damages for personal injury.
There was a verdict and judgment for defendant, and plaintiff
appeals. *Reversed and Remanded.*

Ryan & Ryan, for appellant.

White & Clarke, for appellee.

WEAVER, C. J. The plaintiff, a child of five years of age,
suing by his next friend, alleges that while upon a public street
in the city of Des Moines he was struck and injured by a
passing automobile, operated by the defendant. He charges
that the accident was occasioned by the negligence of the
defendant in driving his car at a speed in excess of 10 miles
an hour, in violation of law and at an unreasonably high speed

and with reckless disregard of the safety of persons lawfully upon the public highway. The defendant denies all the allegations of the petition. The evidence shows without substantial dispute that defendant with two other persons was driving his car along a street in the city of Des Moines at a point where the lots on either hand are quite generally occupied by residences; that plaintiff, who had been playing in or near the street, undertook to cross the roadway some distance in front of the car. The defendant, when at a distance which he estimates at one hundred and fifty feet, saw the boy at the sidewalk, and on approaching nearer, saw him start toward the other side. Reaching the middle of the street, the boy hesitated for an instant, and defendant, instead of attempting to pass behind him, increased the speed of his car with the purpose of passing ahead of him. In trying to avoid the imminent collision defendant swung the car so far out of the road as to strike the curb and mount the parking. It is the theory of the plaintiff that the car struck him at about the same time it hit the curb, knocking him down, breaking his collarbone, and inflicting severe wounds upon his face. The defendant denies that the car struck the plaintiff, and suggests the thought that the injuries complained of were the result of a fall upon the pavement.

I. So far as the preponderance of witnesses is concerned, it is largely with the plaintiff, to the effect that the car was being operated at a speed in excess of ten miles an hour, and that in its passage or attempted passage it came in collision with the boy; but the conflict in the testimony was doubtless sufficient to take that question to the jury, and, were this the only matter to be considered on appeal, the judgment would have to be affirmed. But other errors are assigned which require our attention.

As a witness in his own behalf defendant testified that his car was in bad order, and not being driven at high speed. He

1. APPEAL: findings of fact: review.

asserted that on seeing the boy in the road he first slowed his speed to less than five miles an hour, and only increased it when that seemed the most prudent thing to do. He further swore that the car did not strike the plaintiff. On cross-examination he was confronted with the following letter, which he admitted was written by him to the parents of the injured boy soon after the accident:

2. NEGLIGENCE:
automobile ac-
cident: evi-
dence.

Redfield, Ia., Nov. 8th, 1909. Dear Mr. and Mrs. O'Neil: I feel so distressed over the painful accident to your dear little boy that I have been unable to rest until I hear how the little man is getting along. The doctors assured me before I left that he was not seriously hurt and I do pray God it may prove correct. I am very thankful the front of the auto did not strike him or he would surely have been killed. One of the friends with me, Mr. Winter, who was thrown out, was painfully hurt in the side. It is a wonder he was not more seriously injured as he weighs over two hundred lbs. My auto is badly damaged. I will have to buy a new axle and three new tires besides the repair on bent irons, etc. I consider the accident wholly unavoidable under the circumstances and feel that I did all in my power to avert it. I am anxious for you to write to me and inform me of his condition. And as you have been to some expense for Drs. etc., I will take pleasure in having you send me the Dr. bill. Tell 'Billy' when I come down I will come and see him and bring him something nice. Hoping this will find the boy much improved, I remain, Yours sincerely, T. M. Redfield.

This letter being offered in evidence by the plaintiff, it was excluded upon the defendant's objection as being incompetent, irrelevant, and immaterial. Plaintiff thereupon offered separately the parts of the letter in evidence in which defendant writes: (1) "I am very thankful the front of the auto did not strike him or he would surely have been killed." (2) "One of the friends with me, Mr. Winter, who was thrown out, was quite painfully hurt in the side. It is a wonder he was not seriously injured, as he weighs two hundred pounds."

(3) "My auto is badly damaged. I will have to buy a new axle and three new tires besides the repairs on bent irons," etc. To each of these offers like objections were sustained. These ruling are assigned as error. The exceptions must be sustained. No reason is suggested why the letter is not competent evidence. It is the written statement of the defendant concerning the subject of controversy, and speaks of facts or alleged facts which are both relevant and material to an inquiry into the truth of the matter in issue. It is not an offer of compromise or settlement, and, even if it were of that character, no such objection was raised. The writer of the letter being a party to the action, its admissibility did not depend upon whether it did or did not tend to impeach his credibility as a witness. It was admissible as his own statement of the facts in language which is fairly open to the construction that he understood or conceded that the young lad had been injured by his automobile. It is not an admission of negligence on his part, but we think no disinterested and candid reader of this letter can draw any other meaning or inference therefrom than that the plaintiff had been injured by collision with the automobile driven by the writer of that communication. The fact of such collision was denied upon the trial, and plaintiff was entitled to the benefit of all available evidence tending to prove the truth of his claim in that respect. It can hardly be the subject of doubt or argument that any statement by the defendant from which an admission against his interest can properly be inferred is admissible in evidence against him.

We think, too, the statements of the letter have a material bearing upon the further question whether the car was being driven at a reasonable rate of speed in view of all the circumstances disclosed by the record. These inferences are so clear it would be a waste of time to enter upon a critical analysis of the defendant's language. The letter gives evidence of being written by a man of intelligence, fully capable of expressing himself with clearness. He disclaims responsibility for the injury, not because the collision did not take place (a

fact which, if it had existed, he would naturally make prominent), but because he considered "the accident wholly unavoidable under the circumstances," and that he "did all in his power to avert it." Language can hardly be framed to more clearly express the thought that he had struck and injured the boy, but without fault on his part.

II. The court instructed the jury that, in order to recover damages, the burden was upon plaintiff to establish by a preponderance of evidence "the allegations of negligence charged in the petition"; that his recovery, if any, must be on the "grounds charged in the petition"; and that, if the jury failed to find the defendant negligent "in the particulars charged in the petition," then there could be no recovery. These instructions are excepted to because the petition alleges two or more acts or grounds of negligence, and the effect of the rule so stated was to require plaintiff to establish all his several charges of negligence when, under a proper statement of the rule, he was entitled to a verdict if he made good his case as to any one of them. In view of the charge as a whole, we should hesitate to reverse the judgment below on this ground alone, but it must be said the objection is well taken. Plaintiff charged negligence, because, as he alleged, defendant was driving the car in excess of the statutory limit of speed. He also charged negligence as at common law, in that defendant drove the car recklessly and without due care to avoid injury to persons upon the highway. If he proved either allegation by a preponderance of the evidence, and that he was thereby injured, he was entitled to recover, and this rule should have been clearly stated to the jury.

Plaintiff asked an instruction to the effect that if defendant was running his car at a speed in excess of the statutory limit, and plaintiff was thereby injured, a verdict for the recovery of damages should be returned.

4. SAME.

This request was refused, and the court on its own motion instructed that, if defendant was operating the

car in excess of the statutory limit of speed, then the jury would be "authorized to find that the defendant in so driving was negligent in the matter of operating his motor vehicle." This expression is followed by language indicating what we deem to be the true rule that such excess of speed is *per se* negligent, yet the use of the words "you are authorized to find" we think was unfortunate, for the jury might readily infer therefrom some discretion on its part in finding negligence upon such a showing of facts.

Other exceptions argued are either not well taken or not liable to arise upon a retrial and we shall take no time in their discussion.

For the reasons hereinbefore stated, a new trial must be had, and for that purpose the judgment of the district court will be reversed and cause remanded.—*Reversed.*

W. F. GUTSCHENRITTER, Appellant, v. GEORGE WHITMORE, E. C. DAMEWOOD, L. B. GAMBLE, S. R. FRANK, W. T. GOODMAN, W. H. WHEELER, JAMES GAMBLE and W. C. JEFFRY, Defendants and Appellees.

Officers: SHERIFFS: LIABILITY FOR ACTS OF DEPUTY. A sheriff is
1 responsible for the acts of his deputy in failing to preserve or turn over to the clerk of the court property or funds coming into his hands as the result of garnishment proceedings.

Same: GARNISHMENT: RETURN OF DEPOSIT. A sheriff is liable for
2 the wrongful act of his deputy in returning to the garnishee a bank draft deposited with him by the garnishee to cover his liability to the defendant, even though a personal judgment was thereafter rendered against the garnishee by reason of its return.

Same: ACTION AGAINST SHERIFF: DEMAND. The fact that the gar-
3 nishee had left the state was a sufficient showing that the judgment against him was not collectible to render the sheriff liable for the wrongful return to the garnishee of the amount deposited with the deputy. And where it appeared that the deposit had been returned to the garnishee, it was not necessary to make a

demand on the sheriff for the same before bringing suit against him and his bond for the wrongful act.

Same: ACCEPTANCE OF DRAFT IN LIEU OF CASH: PRESUMPTION:

4 ESTOPPEL. A sheriff is not bound to accept from a garnishee a check or draft in discharge of his liability to the defendant, but having done so he is in no position to complain that the amount was not in cash; as it will be presumed in the absence of a contrary showing that the draft would have been cashed if presented.

Same: DUTY OF SHERIFF: KNOWLEDGE OF GARNISHEE: CONDITIONAL

5 PAYMENT. A garnishee is chargeable with knowledge of the statutory duties of a sheriff, with respect to the disposition of the amount paid him in discharging the obligation of the garnishee to the defendant; and in paying the amount to the sheriff he can impose on him no condition with reference to the disposition of the fund calculated to deter the sheriff in the performance of his legal duty.

Same: DUTY OF SHERIFF. In garnishment proceedings the sheriff acts

6 in a ministerial capacity and his relation to the plaintiff is like that of agent; and he can make no arrangement or agreement with the defendant or garnishee, respecting the fund garnished, inimical to the interests of the plaintiff.

Garnishment: JUDGMENT: SUFFICIENCY. A judgment entry in gar-

7 nishment proceedings which recited that the cause came on for hearing on the answer of the garnishee, the defendant not appearing, and that legal notice of the action and of the garnishment had been given by publication, proof of which was on file, and that the garnishee was indebted to the defendant in a stated sum, sufficiently referred to notice of the suit and of the garnishment.

Same: Where the attachment defendant was served by publication so

8 that personal judgment could not be rendered against him, the judgment against the garnishee need not refer to the original judgment against the defendant.

Judgments: SERVICE BY PUBLICATION. Personal judgment cannot be

9 rendered against a defendant in attachment proceedings who was served by publication, and jurisdiction will not be acquired until it is ascertained that the garnishee is indebted to him.

Garnishment: JUDGMENT: SERVICE BY PUBLICATION. A judgment

10 against a garnishee served by publication is not to be regarded as final like a personal judgment; neither is it evidence that any-

thing was owing by him, nor is it a bar to subsequent action, unless satisfied by the garnishee; nor can an action be maintained thereon; and it may be assailed by other attaching creditors or by strangers.

Same: To sustain a judgment against a garnishee there must be a finding that defendant was indebted to plaintiff, and that the garnishee was indebted to the defendant, otherwise the entry will be of no validity. In the instant case the amount owing by defendant to plaintiff was not expressly found, but clearly to be inferred from the findings therein, and is sufficient to authorize judgment against the garnishee.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

SATURDAY, JANUARY 25, 1913.

ACTION against George Whitmore, as sheriff, and the sureties on his official bond resulted in a directed verdict for him and judgment thereon. The plaintiff appeals.—*Reversed.*

Earl R. Ferguson and C. R. Barnes, for appellant.

Denver L. Wilson, for appellees.

LADD, J. This is an action against George Whitmore, as sheriff, and the sureties on his official bond for the conversion of a bank draft alleged to have been held by him through a deputy sheriff to satisfy the claim of plaintiff in an action against Walter Brown. It appeared that, in aid of the action against Brown, a writ of attachment issued and was placed in the hands of C. W. Grafton, a deputy sheriff, for levy which was effected February 11, 1911, by serving A. F. Swanson notice of garnishment and taking his answer, which disclosed that he was indebted to Brown in the sum of \$300. About a month afterwards, the garnishee, with T. W. Keenan, his attorney, called on the deputy, and, through Keenan, delivered to him a draft or check for \$300 on a bank at Essex. In

doing so the deputy sheriff was told not to cash it under any circumstances, nor to turn it over to court, but to hold it "subject to Swanson's orders, because he didn't owe the bill and he didn't intend to pay it"; that "he was going away," with the suggestion added to deposit it in a vault for safe-keeping. On April 12th following, Keenan demanded the draft of Grafton, saying: "It was Swanson's property, and he had a right to take it any time he wanted to." Thereupon the deputy returned the draft, taking the following receipt: "Shenandoah, Iowa, April 12th, 1911. Received of C. W. Grafton, deputy sheriff, draft for three hundred dollars deposited by me with him in the case of W. F. Gutschenritter, plaintiff, v. Walter Brown, defendant, v. A. F. Swanson, garnishee. A. F. Swanson, By Thos. W. Keenan, his attorney."

Prior thereto, and on April 4th, Swanson had filed a formal answer as garnishee, denying any notice had been served on defendant Brown, and setting up that he had turned over to the sheriff or deputy sheriff "the \$300 referred to in his answer to said garnishment; that he is not in any way interested in the outcome of the controversy between plaintiff and defendant herein, but asks that his rights, as garnishee, be protected; that the money above referred to be held by the sheriff awaiting the final outcome of this action, and that the said sum, or such portion thereof as is not required to pay whatever indebtedness may be owing from defendant to said plaintiff, be surrendered to said defendant as part payment on the land contract, a copy of which is hereto attached. Wherefore said garnishee prays that the said garnishment be dissolved, and that he be dismissed and given his costs herein; that he be exonerated from all liability to the defendant by reason of said \$300 this day paid into court; and that the rights of all parties to said money be determined by this court, and that the rights of said garnishee be protected." This answer was signed by Keenan, as attorney for Swanson, but, though offered in evidence, was excluded on objection as incompetent, irrelevant, immaterial, and not binding on de-

fendant. The record discloses that notices were duly served by publication on defendant Brown, and that in June, 1911, judgment was entered against the garnishee, who had left the state since, for \$191.76 and \$37.35 costs. These facts were regarded by the court as insufficient to carry the issue as to the liability of the sheriff to the jury.

I. The sheriff is by statute made responsible for the acts of his deputies (section 510, Code; *Headington v. Langland*, 65 Iowa, 277), and it is his duty, aside from serving and

1. OFFICERS:
sheriffs: liability for acts of deputy.

returning writs and other legal processes, to perform "such other duties as may be required of him by law." Section 499, Code. His bond is the security furnished for so doing. Section 1183, Code. Upon written direction so to do, the sheriff is required to take the answer of the garnishee when notice of garnishment is served; (section 3939, Code), or the garnishee may be required to appear and answer such questions as may be deemed proper (section 3941, Code), and the plaintiff, if so disposed, may controvert the answers given on such examination or in response to interrogatories propounded by the sheriff. Section 3945, Code. And, at any time after answer, the garnishee may "exonerate himself from further responsibility by paying over to the sheriff the amount owing by him to the defendant and placing, at the sheriff's disposal, the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached. Section 3944, Code.

If in any of the above methods it is made to appear that the garnishee was indebted to the defendant, or had any of his property in his hands, at the time of being served with the notice of garnishment, he will be liable to the plaintiff, in case judgment is finally recovered by him, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee, and the plaintiff may have a judgment against the garnishee for the amount of money due from the garnishee to the defendant in the main action or for the delivery to the sheriff of any money or property in the garnishee's hands belonging to the defendant in the

main action within a time to be fixed by the court, and for the value of the same, as fixed in said judgment, if not delivered in the time thus fixed, unless before such judgment is entered the garnishee has delivered to the sheriff such money or property. Property so delivered shall thereafter be treated as if levied upon under the writ of attachment in the usual manner.

Two other statutes may also be set out:

Section 3902: All money attached by the sheriff, or coming into his hands by virtue of the attachment, shall forthwith be paid over to the clerk, to be by him retained till the further action of the court.

Section 3903: The sheriff shall make such disposition of other attached property as may be directed by the court or judge, and where there is no direction upon the subject, he shall safely keep the property subject to the order of the court.

If, then, the draft came into the deputy sheriff's possession in the garnishment proceedings and in pursuance of section 3944 of the Code quoted above, and is to be regarded as money, it should have been paid to the clerk under section 3902, and, if considered property, should have been "treated as if levied upon under the writ of attachment in the usual manner," to be disposed of as might "be directed by the court or judge," and, in the absence of any such direction, to be "safely kept" subject to the order of the court.

II. Several points raised by appellee first should be disposed of: (a) The plaintiff would have the right to the application of the proceeds of the draft to any amount he might show himself entitled to recover from the de-

2. SAME: garnish-
ment: return
of deposit.

fendant Brown, and, if deprived thereof through the wrongful act of the deputy sheriff to his damage, he was entitled to maintain an action therefor. That he was so deprived of the proceeds of the draft was included in the allegations of the petition. (b) As contended, the draft or its proceeds were not condemned to the satisfaction of plaintiff's claim against Brown. This was for the

reason that the deputy, by returning the draft, had rendered this impossible, and the wrongful act in so doing accounts for the personal judgment against the garnishee. Its rendition in no manner waived the wrong of the deputy, but rather defined the extent of the injury by ascertaining what portion of the deposit should have been applied on the judgment defendant's debt to plaintiff. (c) The circumstance that the garnishee had left this state and was residing in South Dakota was a sufficient showing, in the absence of other evidence, that the judgment against

3. SAME: action
against sher-
iff: demand.

him was not collectible in this state. (d) It is also said that the draft was delivered to Grafton individually, and not as deputy sheriff. If this were so, how came he to exact a receipt to himself as deputy sheriff when he returned the draft? Judge Castle testified, when asked what success he had in serving the writ, the deputy answered he had gotten \$300. These with other circumstances were sufficient at least to carry that issue to the jury. (e) Nothing could have been gained by demanding of the sheriff the draft before beginning suit. His deputy had returned it to the garnishee long before action was instituted and the latter had left the state. The law does not exact doing useless things, and for this reason no demand was necessary before commencing this action. (f) There is no pretense that the draft belonged to the judgment defendant. It is to be inferred that it was payable to the deputy sheriff or indorsed to him, else there was no occasion for insisting that he should not procure the money thereon from the bank.

It must have been turned over to the officer in lieu of money, and in these days when the bulk of business, official as well as general, is transacted through the execution of checks and drafts, the presumption prevails

4. SAME: accept-
ance of draft
in lieu of cash:
presumption:
estoppel.

in the absence of any showing to the contrary, that, had it been presented, it would have been accepted and honored.

Of course the deputy sheriff might have declined to re-

ceive other than cash, but he received the draft without objection and is not in a situation to complain if it is treated as money at its face value.

III. The statutes heretofore quoted defined the duties of the deputy sheriff in receiving the draft, and the garnishee, in dealing with him, was charged with knowledge of precisely

5. SAME: duties of sheriff: knowledge of garnishee: conditional payment. what these were. It was not competent for the garnishee to impose on the sheriff conditions on which he might receive property or money in exoneration of the garnishee's lia-

bility, nor does it appear that the deputy undertook to comply with those suggested to him. Having received the draft, the law prescribed what should be done with it.

In *Greenhood on Public Policy*, at page 306, the author well says that "any agreement which in itself is, or which contemplates or involves or requires or is calculated to induce, a dereliction or laxity in the performance of public or private duty of men is void." And such is the doctrine of this court. *Cole v. Parker*, 7 Iowa, 167; *Cass County v. Beck*, 76 Iowa, 487.

The acts of the sheriff in seizing property under a writ of attachment and in the matter of garnishment thereunder are purely ministerial, and therein his relation to plaintiff is like that of agent. *Blaul v. Tharp*, 83 Iowa, 665; *Sigler v. Murphy*, 107 Iowa, 128.

6. SAME: duty of sheriff. It is said in *Mechem on Agency*, section 590: "Whenever the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the public officer is liable to such individual for any injury which he may sustain in consequence of the failure or neglect of the officer, either not to perform them at all, or to perform them properly. In such a case the officer is liable as well for nonfeasance as for misfeasance or malfeasance."

The theory on which the officer is held as agent is explained thus in 5 *Thompson on Negligence*, section 6405:

Another distinction exists, in respect of the liability of officers, between those who act directly for the public, and indirectly or mediately for individuals, and those who act directly for individuals, and indirectly or mediately for the public; or, stated another way, between officers who act for the public collectively, and those who act for the public distributively. The officers already instanced—the member of the Legislature, the Governor, the judge, the policeman the road overseer—belong to the former class. To the latter class belong clerks of courts, notaries public, recorders of deeds, sheriffs, constables, coroners when executing civil process, and inspectors of meats. These officers are required by the statutes governing their office, to perform certain designated duties for any individual who may tender to them, or secure the payment of, the statutory fee, and sometimes without this prerequisite. Their relation to an individual, who thus requests them to act, is analogous to a relation resting in contract. The liability of the officer is the same as though he had agreed with the individual to do the particular work for the stipulated fee and then had failed wholly or in part to do it. A privity exists between them, corresponding to what is called privity of contract, and the individual may recover of the officer the damages he has suffered from the failure of the officer to perform the required duty, or his negligence in performing it.

Says Freeman in his work on Executions, section 108:

One inquiry will be answered here, Who is entitled to control the writ? The officer should always bear in mind that the writ is intended for the benefit of the plaintiff, who alone is interested in its enforcement. The interest and wishes of the plaintiff should at all times be respected. . . . But all directions of the plaintiff, not savoring of fraud nor undue rigor or oppression, must be obeyed, or the officer will be held liable for injuries flowing from his disobedience.

For this reason, arrangements made by the sheriff in pursuance of directions or an agreement by plaintiff were carried out in *Bank v. Loomis*, 100 Iowa, 266, and *Buckham v. Wolf*, 58 Iowa, 601.

But we have discovered no authority upholding any agreement or understanding by the sheriff with the attachment or judgment defendant or a garnishee inimical to the interests of such plaintiff. Were this permissible, the efficiency of the officer would be impaired and the effectiveness of process destroyed. He may not contract to neglect or abandon a legal duty, whether this be due plaintiff as one of the public or to the public generally. See *Cole v. Parker, supra*. The statute defined precisely what the deputy sheriff should do upon receiving the draft from the garnishee—i. e., if money, pay over to the clerk of the court; if property, safely keep until otherwise directed by the court. He did neither, and therein was derelict in the performance of his duty. In view of what has been said, it seems needless to add that evidence of the conditions sought to be imposed on the deputy sheriff in delivering the draft were inadmissible, regardless of the purpose which actuated him. What the garnishee may have said in nowise impaired the deputy's duty with respect to the draft, and though not bound to exonerate himself as garnishee by paying over to the sheriff, having elected so to do, he is conclusively presumed to have done so with knowledge that the sheriff, upon receiving the same, would dispose thereof precisely as directed by statute.

IV. One of the grounds of the motion to direct a verdict for defendant was that plaintiff "failed to show the existence of a valid judgment or order or finding against the principal defendant Brown, or the amount
 7. GARNISHMENT: judgment: sufficiency. or extent of his indebtedness, if any, to the plaintiff," and also that no notice of the garnishment proceedings had been given. The only judgment entry introduced in evidence reads:

W. F. Gutschenritter, Plaintiff, v. Walter Brown, Defendant, v. A. F. Swanson, Garnishee, Walter Brown, Defendant. No. 414. This cause coming on for hearing on the answer of A. F. Swanson, garnishee, heretofore filed, and Ferguson & Barnes, attorneys for plaintiff, being present in court, and T. W. Keenan, attorney for said A. F. Swan-

son, garnishee, being present in court, but the defendant, Walter Brown, appearing not nor any one for him, and it appearing to the court that legal notice of the pendency of this suit and of the garnishment of the said Swanson as the supposed debtor of the defendant had been given, and proof of publication of said notice on file with the clerk of this court, and it further appearing from the answer of said garnishee that he is indebted to the defendant Walter Brown in the sum of \$300, all of which is shown to the satisfaction, and the court being advised in the premises, it is ordered and adjudged by the court that the plaintiff, W. F. Gutschenritter, have and recover judgment against the said A. F. Swanson, garnishee, in the sum of \$191.76, at 6 per cent. interest thereon from this date, and the costs of this suit, together with the costs of the original suit of W. F. Gutschenritter v. Brown, taxed at \$37.35. George H. Castle, Judge.

The evidence disclosed that defendant Brown was duly served with notice by publication, and the recital in the entry, though singular, sufficiently referred to both the notice of the pendency of the suit and that of the garnishment proceedings.

It is to be observed, however, that the entry contains no express finding that anything was owing plaintiff by Brown, nor does it refer to any judgment in the original action against

Brown. Section 3952 of the Code declares
 8. SAME. that, "when judgment is rendered against a garnishee, the same shall distinctly refer to the original judgment." This is for the reason that the order on the garnishee to pay is dependent on the judgment against the defendant, in the absence of which the garnishee cannot be required to pay.

As service on the defendant was by publication only, personal judgment might not have been entered against him, and the court did not acquire jurisdiction until it was ascertained

that the garnishee was indebted to him. In
 9. JUDGMENTS :
 service by pub- some states personal judgments are entered
 lication. against defendants on notice by publication,
 to be satisfied by special execution only, and in others the

judgment against the garnishee merely includes a finding of the amount owing by the debtor to plaintiff, and direction for the application of the proceeds of the levy of the attachment.

The form of entries is not so material, as judgment on such service is not regarded as final, like a personal judgment (*Kimball v. Nichol*, 58 Ga. 175) nor is it evidence of anything owing or a bar against subsequent action, unless satisfied by the garnishee. *Conwell v. Thompson*, 50 Ill. 329; *Bliss v. Heasty*, 61 Ill. 338; *Jackson's Appeal*, 2 Grant, Cas. (Pa.) 407.

10. GARNISH-
MENT: judg-
ment service
by publica-
tion.

An action cannot be maintained thereon. *Miller v. Dungan*, 36 N. J. Law, 21. And it may be assailed by other attaching creditors or strangers. *Meyer v. Gage*, 65 Iowa, 606.

Two requisites are universally held to be essential, however, (1) that defendant be found to be indebted to plaintiff; and (2) that the garnishee owe the defendant, and, unless these appear in the judgment entries or entry,

11. SAME.

it is of no validity. 2 Shinn on Attach. & Gar. section 681. Where there is personal service of the original notice, the statutes undoubtedly contemplate a judgment against the defendant and a separate judgment entry against the garnishee, referring therein to the original judgment; but when jurisdiction over defendant personally is not acquired, and is exercised against defendant's property only through service of the original notice by publication, all the court may do is to condemn the property seized under the writ of attachment or in the hands of the garnishee to the satisfaction of the indebtedness found to be owing plaintiff by defendant, and there is no necessity for two judgment entries to accomplish this. The jurisdictional facts, as well as the findings of the amount owing by defendant to plaintiff, may be recited in the judgment entry condemning the attached property or in the judgment against the garnishee for his debt to the defendant, or enough thereof to satisfy the indebtedness found to be owing plaintiff by the defendant, and

this for the reason that in such a case but one judgment is or can be rendered.

Reverting to the judgment entry set out, it will be observed that everything essential to its validity is contained therein, with the possible exception of a finding of the amount owing by defendant to plaintiff. That is not expressly found, but is clearly to be inferred therefrom. Manifestly the amount of the judgment was fixed at less than the indebtedness of the garnishee to defendant, for that only such amount was owing by the latter to plaintiff, and, as the court could enter judgment against the garnishee only upon a finding that a like amount was owing plaintiff, it is to be inferred that the court actually found defendant to have been indebted to plaintiff in the sum for which judgment was entered against the garnishee. No objection to the judgment entry was interposed, and, even though the same may be somewhat informal, it was subject to correction on motion of any of the parties thereto. This being so, the sheriff is not in a situation to complain of such informality in an action against him for damage consequent on his wrongful act in preventing the satisfaction of plaintiff's claim.

For the reasons stated, the judgment was not void, and the court erred in directing the jury to return a verdict for defendant. It should be added that there was also error in not admitting the garnishee's answer in evidence, as bearing on the judgment entry, if for no other reason.—*Reversed.*

SARAH A. JAMISON, W. O. JAMISON, J. W. JAMISON, R. E. JAMISON, SADIE JAMISON, GERTRUDE J. SMITH, LULU HAMILTON and CORA J. JONES, Appellees, v. MYRTLE LODGE No. 355 OF A. F. & A. M. and CRYPTIC CHAPTER No. 34 OF A. F. & A. M., Appellants.

Real property: EXCAVATION: LIABILITY FOR INJURY TO ADJOINING
1 LAND. In making an excavation of earth close to the boundary

line of adjoining land, reasonable precaution must be taken to prevent the neighbor's soil from falling, and if this has been done and the soil falls of its own weight and pressure liability for injury to the land alone attaches; if however, it falls solely from the weight of the superstructure, no liability attaches for injury either to the soil or the superstructure. But if the adjoining land sinks and falls by reason of the negligent manner in which the excavation was made, liability for injury to both the soil and superstructure follows.

Same: NEGLIGENCE: EVIDENCE. In this action for injury to adjoining property caused by an excavation, the evidence is held to require a submission of the question of defendant's negligence in failing to adequately support the ground of the adjoining owner, and to support a finding that the soil fell from its own weight and pressure and not from the weight of the superstructure.

Same: CONTRIBUTORY NEGLIGENCE: PLEADINGS. The owner of property is required to exercise reasonable care to preserve his building from injury by reason of the excavation of the adjoining lot; and in suing for damages on account thereof must plead and prove freedom from contributory negligence.

Same: . REMOVAL OF LATERAL SUPPORT: NOTICE. Where the owner of a building occupied the same while the work of excavating the adjoining lot progressed and he knew of the work, he was not entitled to notice of what was being done.

Contributory negligence: PLEADING. Failure to plead freedom from contributory negligence in the original petition is cured by pleading the same in an amendment, even after verdict.

*Appeal from Wayne District Court.—HON. H. K. EVANS,
Judge.*

SATURDAY, JANUARY 25, 1913.

ACTION for damages resulted in a judgment against defendants, from which they appealed—*Affirmed.*

Miles & Steele, for appellants.

Wilson & Smith and Poston & Murrow, for appellees.

LADD, J.—Plaintiffs owned lots 5 and 6 in block 14 in Seymour, abutting Fourth street. On these lots was a wooden building veneered with brick, two stories high, twenty-two feet in width, and eighty feet long fronting west on said street. It rested on a stone foundation, which on the south side was from two to three feet high and about three feet from the south line of the lots. Immediately south of this line is a lot or part of a lot owned by the defendants. About September 1, 1907, they began excavating a cellar or basement to be about eight feet deep and extending from the street back one hundred feet and up to the line mentioned. When the excavation was nearing completion, and during several days prior to the occurrence in controversy, considerable rain fell, and the evidence tended to show that the soil at the north bank of the excavation softened somewhat and was crumbling away; that this continued until the brick began to fall and the foundation to slip, so that the building settled about sixteen inches near the center on that side. The evidence also indicated that the usual method in protecting a bank next to an excavation is by lumber and posts or curbing, or by constructing the wall in sections as the excavation proceeds, and that, had this been done, the soil of plaintiffs' lots would not have crumbled into the cellar. The evidence tended to show that the withdrawal of support by excavating the cellar caused the soil in its natural condition to crumble away, and the issue of whether the wall of the building slid out and let it settle down in consequence of withdrawing the lateral support of the soil in its natural condition also was submitted to the jury; the court saying that defendants "would only be required to use ordinary care in giving lateral support to the lot without the added weight of the building, and, if any additional support or precaution was necessary to protect the building, it was the duty of plaintiffs to furnish such support, and if the alleged injury and damage to plaintiffs' building was not caused by the negligence of the defendant in failing to use ordinary care in giving lateral support to the soil of

plaintiffs, but was caused by the weakness or decayed condition of the plaintiffs' building or because of the added weight of the building, then plaintiffs cannot recover."

I. The principle that an owner may excavate the earth from his own land up to the line of that adjoining, and to whatsoever depth he may please, provided

1. REAL PROP-
ERTY: excava-
tion: liability
for injury to
adjoining land.

this does not interfere with the lateral support of the soil of the adjoining land, is not questioned. Incident to the land in its natural condition is the right to support from the adjoining land, and if, without being subjected to artificial pressure, it sinks and falls away in consequence of the removal of such support, the owner may have an action for damages against the party removing such support. This right of action does not depend on any want of care in the removal of the soil, but upon the violation of the right of property which has thus been invaded and disturbed. *McGuire v. Grant*, 25 N. J. Law, 356 (67 Am. Dec. 50); *Moellering v. Evans*, 121 Ind. 195 (22 N. E. 989, 6 L. R. A. 449, 2 Washb. Real Prop. page 389). The petition contained allegations of injury of this character, and therefore the omission to allege absence of contributory negligence was not a fatal defect therein. The withdrawal of such lateral support may be done in such a manner, however, as to create a liability beyond the injury to the land alone. The law requires of every man that he shall so use his own property as not unnecessarily to injure that of his neighbor, and therefore, if in making the excavation, which he has a right to do, he does it in a negligent manner, he will be liable for the full consequences of such negligence, not only for the injury to the soil itself, but to the improvement or superstructure thereon. *Urick v. Dakota Loan & Trust Co.*, 2 S. D. 285 (49 N. W. 1054); *Block v. Haseltine*, 3 Ind. App. 491 (29 N. E. 937); *Quincy v. Jones*, 76 Ill. 241 (20 Am. Rep. 243); 1 Thomp. Orig. section 1106 et seq.; *Walker v. Strosnider*, 67 W. Va. 39, (67 S. E.

1087, 21 Ann. Cas. 1); *Gildersleeve v. Hammond*, 109 Mich. 431 (67 N. W. 519, 33 L. R. A. 46).

In the last case the evidence tended to show that the soil contained sand and gravel, and that, on the excavation being made, the adjoining land would have slid into the excavation had it been in its natural condition, and that in doing so the building was injured, and the court, after a somewhat extended review of the authorities, concluded "as to the law of this and similar cases" that: "(1) While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling (2) If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructures. (3) If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure. (4) If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions." This is a clear summary of the law with reference to the liability of the excavator, and the instructions given were in harmony therewith.

II. If, then, in excavating the cellar, defendant thereby deprived the soil of plaintiffs' lot of support, and solely in consequence thereof, and not, because of the weight of the building thereon, it crumbled or slid over into the cellar, plaintiffs were entitled to recover the damages to the land in its natural state or condition. There was no evidence of damage to the soil alone, so that at most a nominal sum only might have been allowed unless it were found further that, in the manner of excavating or in omitting to protect the walls against falling, the defendant was negligent in consequence

2. SAME: negli-
gence: evi-
dence.

of which, and not of the weight of the building thereon, the soil of plaintiffs' lot crumbled and fell away, in which event, in the absence of fault on their part, plaintiffs would be entitled to recover not only damages resulting therefrom to the lot but to the building as well. On this last issue appellant contends there was not sufficient evidence to warrant its submission to the jury. The evidence was in conflict as to whether anything was done in the way of adequately supporting the soil of the adjoining lot; and, as there was testimony that this had been crumbling away for several days before the building settled, the issue as to whether defendants exercised that reasonable care exacted in supplying artificial support to the soil as by curbing or putting in posts and boards and the like, or in laying the foundation in sections as the excavation proceeded, was for the jury to determine. Conceding this, it is said that the evidence failed to show that the settling of the building, but for its weight, would have resulted from the removal of the lateral support. In other words, it is contended that there is not sufficient evidence to show that, without the added weight or pressure of the building, the soil in its natural state would have crumbled and fallen away, in consequence of the excavation, back to or under the building so as to have caused it to settle as alleged. An examination of the record has convinced us otherwise. The building was but three to three and one-half feet from the lot line. The depth of the excavation opposite where the building settled was estimated by different witnesses at from three or four to nine or ten feet. Madison testified that he was at the building on the day it settled, and was "watching the bank by the Jamison building; it began to slide in places quite a little. There was quite a big slip started in the north wall of the excavation towards the northeast end—the northeast part of the wall. It went west a considerable distance. It started about twenty feet from the east end. The excavation extended about fifteen to twenty feet east of the Jamison building. . . . I noticed the

crumbling or caving in condition several days before it fell in. When it fell in, it started to go towards the northeast end. It kept up until it reached the wall of the Jamison building, and then the bricks began to come, and considerable fell out. . . . It was the center part of the Jamison building that slipped over into the excavation. In some places the building had slipped in not more than six inches, and in some places it would be a little over three feet."

Beebe was at the building a few minutes after it fell, and testified: "It seemed to have settled in the middle; the foundation and stone work had gone down with the bank, and left it so that it creeled in the center; there were large cracks up the side of the brick work, and the brick work had crumbled some. I think the foundation had gone down sixteen inches in the middle. The ends of the building stayed up because it did not cave at the ends. The first story of the front was glass, and the second story veneered and had two or three windows. The glass was broken. The east and west ends of the building did not settle. No part of the building fell clear over. The principal cave was at the center. There was not very much of the veneered brick wall off, as I saw it that afternoon."

The account of one of the Jamisons was as follows: "When the building was precipitated into the excavation, it settled in the middle about sixteen to eighteen inches on one side. No other part of the building settled, except the front end was leaning a little; 'it was in a twist.' The fall affected the building so that it was all out of shape, was crooked; it was in a creel or buckle. Back fifty feet from the front it was settled; that left the other part of it in a twist. The floor went down until it struck solid ground on the south side. That is the walls. The foundation went down in the excavation. A part of the foundation slipped out from under the building. The foundation of the building was two and one-half or three feet of rock. The foundation slipped out for about twenty

feet along the side of the building. Part of the foundation was out from under the building and part under it."

McAlister related that he "saw the excavation going on probably every day, and my attention was called to the crumbling and caving condition of the north wall prior to the caving of the building. The building caved on Monday, and I noticed the caving in of the wall of the excavation the previous Sunday. The caving condition of the north wall was not to any great extent at that time. I should judge the excavation then was in the neighborhood of eight feet. The crumbling condition of the wall seemed to be towards the top. . . . The soil in and around Seymour is what we term 'joint clay.' The first layer is black soil, then you get down into the clay. The ordinary effect of a period of rainfall on that kind of soil is to make it crumbly. There is hardly ever a case where an excavation stands without crumbling away or sloughing off."

Another swore that "at the time the building caved in there was about forty feet of wall along the building had slipped in. There was a stone wall about three feet under the Jamison building. . . . Even if a building should be situated five to ten feet away if the wall was slipping, the proper method of protection would be by building a wall in sections or support it by lumber, usually by lumber."

One Stormson testified that he had seen the clay slip or cave in prior to the day the building settled, and that on that day he was digging in the cellar and noticed "the clay made a slip sidewise. . . . The building dirt and brick of the Jamison's building came. The dirt came first, and then the brick came."

Others testified concerning the occurrence, and there was other evidence indicating that joint clay when dry was hard, but when subject to the action of water was likely to crumble and fall away. Some of the evidence referred to was controverted by the defendant. Enough has been set out, however, to show that the issue was fairly for the jury.

From the evidence of the distance of the building from the excavation, the character of the soil, of recent rains, and that the soil when wet crumbled away, the jury might have concluded that without weight or pressure of the building the soil in its natural condition, in consequence of the removal of lateral support, crumbled and fell so as to permit the building to settle as alleged. The instructions with commendable clearness and perspicuity submitted this with other issues to the jury.

III. Appellant also contends that the court erred in not submitting whether plaintiffs were without fault to the jury.

3. SAME: contributory negligence: pleadings: evidence. Of course they might not have entered on defendant's lot in bracing or otherwise sustaining the bank, but apparently there was nothing to prevent them from strengthening their wall by interposing support from beneath or laterally, and thereby have avoided the injury. The excavator is under no duty with reference to the building save that of exercising ordinary care in what he does, and there seems no tenable ground for not exacting like degree of care from the adjoining owner in preserving the superstructures on his land from injury consequent from the withdrawal of lateral support. The rule prevails in this state that, in actions based on negligence, the injured party, in order to recover, must not only plead, but affirmatively prove, his freedom from negligence proximately contributing to the injury.

4. SAME: removal of lateral support: notice. The plaintiffs were occupying their property and as well aware of the situation as the work of excavating progressed as defendant, and for this reason there was no occasion for notifying plaintiffs of what was being done. *Schultz v. Byers*, 53 N. J. Law, 442 (22 Atl. 514, 13 L. R. A. 569, 26 Am. St. Rep. 435); *Novotny v. Danforth*, 9 S. D. 301 (68 N. W. 749). Moreover, some of the evidence adduced tended to show that the building was not well constructed and the ends of the joists were decayed, and, as they might be presumed to know its

condition, it was fair for the jury to say whether, in view of all the circumstances disclosed, plaintiffs, in the exercise of ordinary care, should have taken measures for the protection of the structure against possible injury from the removal of lateral support. This was precisely what the jury was told in the ninth instruction hereinbefore quoted in saying that, "if any additional support or precaution was necessary to protect the building, it was the duty of plaintiffs to furnish such support." This is all plaintiffs could well have done, and we are of opinion that the issue of contributory negligence, in so far as involved, was fairly submitted to the jury.

Freedom therefrom was not alleged in the petition, but, after the verdict was returned, an amendment to the petition so alleging was filed. This cured the defect. Section 3760, Code; *Beard v. Guild*, 107 Iowa, 476; *Decatur v. Simpson*, 115 Iowa 348.

The record is without error, and the judgment is *Affirmed*.

In re KIMBALL ESTATE, JOHN FLANIGAN, Appellant, v. ELLIOTT KIMBALL, Appellee.

Estates of decedents: PREMATURE DISCHARGE OF ADMINISTRATOR: EFFECT. The discharge of an administrator or executor before the expiration of a year from the date of the first publication of notice to creditors is not binding upon a creditor without notice thereof, and his right to file his claim during the year was not affected thereby; the statutory time for filing being merely suspended during the time of the premature discharge.

Same: CLAIMS: EQUITABLE RELIEF. Where peculiar circumstances are shown entitling a claimant against an estate to equitable relief, the court has power to act in his behalf after the discharge of the administrator or executor. Thus where the executor, sole beneficiary under the will, was prematurely discharged, the court had power to grant relief to a creditor of the estate who had no notice of the discharge, and who had not previously filed his claim.

Appeal from Dubuque District Court.—HON. JOHN W.
KINTZINGER, Judge.

FRIDAY, JANUARY 17, 1913.

ACTION by the holders of a claim against the estate of N. W. Kimball, deceased, to set aside an order approving the final report of the executor and ordering his discharge. Defendant demurred to the petition and his demurrer was sustained. Claimant appeals.—*Reversed.*

M. E. McEnany, for appellant.

Lyon & Lyon, for appellee.

DEEMER, J.—As the demurrer to the petition was sustained, the facts recited therein are admitted, and, even though the allegations be general, no motion having been made for a more specific statement, they must be accepted as true. It appears that defendant, Elliott Kimball, was appointed executor of the last will and testament of N. W. Kimball, deceased, on the 19th day of June, 1909. He gave notice of his appointment by publishing the statutory notice, the first of which publications was on the 3d day of July of the same year. He did not qualify until December 3, 1909, but on June 18, 1910, filed his report, and without notice to claimant herein was, on the same day, discharged. Plaintiff filed his claim in the office of the clerk of the district court on July 2, 1910, and on the same day served notice thereof upon the defendant. He commenced this action on the 21st day of October, 1910. Of the many questions argued we need consider but one, and that the validity of the order of discharge, which was entered before the expiration of one year from the time the executor was appointed.

Section 3338 of the Code provides that:

Claims against the estate shall be clearly stated, and,

if founded upon a written instrument, the same or a copy thereof and of all indorsements thereon shall be attached as a part of the statement, and if upon account, an itemized copy shall be attached, showing the balance; which statement must be sworn to and filed with the clerk of the district court, and ten days' notice of the hearing thereof—which shall be at some regular term of the court—accompanied by a copy of the claim, shall be served on one of the executors or administrators in the manner required for commencing ordinary actions, unless the same has been approved by the executor or administrator, in which case it may be allowed by the clerk, without notice, and so entered upon the probate calendar.

Section 3339 reads as follows:

All claims filed against the estate shall be entitled in the name of the claimant against the executor or administrator as such, naming the estate, and in all further proceedings thereon this title shall be preserved.

Section 3340 is in part as follows:

All claims filed, and not expressly admitted in writing signed by the executor or administrator, with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate, but special defenses must be pleaded.

And section 3341 reads:

If a claim filed against the estate is not fully admitted by the executor or administrator, the court may hear and allow the same, or may submit it to a jury and on the hearing, unless otherwise provided, all provisions of law applicable to an ordinary action shall apply.

Sections 3348 and 3349 provide that:

Other demands against the estate shall be payable in the following order: "1. Debts entitled to preference un-

der the laws of the United States; 2. Public rates and taxes; 3. Claims filed within six months after the first publication or posting of the notice given by the executors or administrators of their appointment; 4. All other debts; 5. Legacies and the distributive shares, if any. Section 3348.

All claims of the fourth of the above classes, not filed and allowed, or if filed and notice thereof, as hereinbefore provided, is not served within twelve months from the giving of the notice aforesaid, will be barred, except as to actions against decedent pending in the district or Supreme Court at the time of his death, or unless peculiar circumstances entitled the claimant to equitable relief. Section 3349 of the Code.

Section 3394 reads as follows:

On the expiration of six and within seven months from the first publication of notice of his appointment, and sooner if required by the court, the executor or administrator shall render his account to the court, showing the condition of the estate, its debts and effects, the amount of money received, and the disposition made of it; and from time to time, as may be required by the court, he shall render further accounts until the estate is finally settled, which final settlement shall be made within three years, unless otherwise ordered by the court. Such account shall embrace all matters directed by the court and pertinent to the subject.

And this is followed by these sections:

Mistakes in settlements may be corrected in the probate court at any time before his final settlement and discharge, and after that time by equitable proceedings, on showing such grounds as will justify the interference of the court. (Code, Section 3398.)

Any person interested in the estate may attend upon the settlement of his accounts and contest the same. Accounts settled in the absence of any person adversely interested, and without notice to him, may be opened within three months on his application. (Code, Section 3399.)

Upon final settlement, an order shall be entered discharging him from further duties and responsibilities. (Code, Section 3400.)

Unless notice be waived in writing, no administrator, executor, guardian or trustee shall be discharged from further duty or responsibility upon final settlement, until notice of the application shall have been served upon all persons interested as required for the commencement of a civil action, unless a different service be ordered by the court or judge, which order may be made before or after filing the final report. (Code, Section 3422.)

From a reading of these statutes, it is clear that a final order of discharge of an executor should not be made until the expiration of a full year from the time of his appoint-

1. ESTATES OF
DECEDENTS:
premature dis-
charge of ad-
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effect

ment; and it is conceded that defendant was discharged before the expiration of that time, and that there still remained at least one day in which claims might have been filed. The order of discharge was not binding, then, upon any claimant who had the right to file during this interim. This is a direct attack upon the order by one who had the right to file, and as to him the order should be set aside, unless he has been guilty of such laches as to deprive him of the right, or by reason of failing to comply with some statute has lost his remedy. As a rule, every claimant must file his claim within one year from the time of the first publication of notice, and if the claim is not allowed by the executor he must give notice of the filing to the executor. Filing alone, after six months, amounts to nothing. The claim must also be allowed by the executor, or notice given within the year. Unless there be an executor vested with authority to allow the claim, or upon whom notice may be served, it is manifest that the statute cannot be complied with. An executor who has been fully discharged by order of court has no authority to allow claims, and notice served upon him after his discharge would be of no effect. A claimant's remedy in such cases would be by timely action to have the order of discharge set aside, and.

then immediately to file his claim and have it allowed, or to give notice to the executor. In other words, the statutory time for the filing of claims is suspended during the time the premature order of discharge remains of record. The rule applicable to the general statutes of limitations does not apply here. Before the passage of the act of the Thirty-First General Assembly, chapter 151, now known as section 3447-a of the Code Supplement, the death of debtor did not toll the statute (*Widner v. Wilcox*, 131 Iowa, 223); and this seems to be the general rule. See, however, *Alice Co. v. Blanden* (C. C.) 136 Fed. 252. But this rule should not be applied to such statutes as are now before us for construction. Here an affirmative act on the part of executor is required, to wit, to admit or allow the claim. If this be not done, then notice must be given to him within the twelve months provided by statute, and this continues down to the expiration of the last day. If, then, there be no executor who may admit or allow the claim, it would seem that the statute is, of necessity, suspended until there be such person in existence.

Aside from this, however, section 3349 contains an exception which we think, is applicable to the facts here pleaded. It provides that under peculiar circumstances entitling a claimant to equitable relief the statute does not apply. Should it appear that the estate was in such a situation that claimant could not comply with the statute, surely this would be a peculiar circumstance entitling him to equitable relief. True he did not, although he could have done so, file his claim within twelve months. But the filing of the claim alone would have given him no standing; for there was no executor authorized to act, or upon whom service of notice could have been made, and the filing would be a useless act. As a matter of fact the claim was filed July 2, 1910, and notice thereof was given to defendant. But for the order discharging him the claim would have been barred; for in such case there would be no equitable circumstances shown. As he had been discharged, the order was valid

2. SAME: claims:
equitable re-
lief.

until set aside. In other words, it was not entirely void. As to all who were notified and failed to appear and contest the order, it was valid and binding, although prematurely entered. The court had jurisdiction of the subject-matter and of the persons, and although it erroneously entered the order, it was not entirely void. The defendant is now relying upon the order, and is in no position to say that he is still, and has at all times been, executor, because the order of discharge was invalid. No notice was served upon claimant in this case, and none was required, unless he had a claim on file and had given the notice required by statute. *Boyle v. Boyle*, 126 Iowa, 167.

But it is admitted that he holds a valid claim against the estate, and there is no reason why it should not have been established. Although it does not appear in pleading, appellee's counsel admit in argument that defendant is the sole beneficiary under the will, which he had been appointed to administer, and that there were no other claims against the estate than the one filed by plaintiff. We take this admission, then, as an equitable circumstance, in connection with the other admitted facts, in giving claimant a standing in court. Other points need not be considered; for the ones already decided dispose of the case.

The trial court was in error in sustaining the demurrer, and the judgment must be, and it is, *Reversed*.

M. A. MORSE, Appellant, v. NANCY Y. HOUGHTON.

Landlord and tenant: DEFECTIVE PREMISES: INJURY TO TENANT: EVIDENCE. A landlord is not liable to a tenant for alleged injuries resulting from defective construction of the premises, where there was no concealment or misrepresentation concerning the same at the time of the lease; but where there was a stairway used by several tenants of the building, which remained in control of the landlord, he was bound to keep it in repair, and if he failed to do so and a tenant was injured in consequence of such neglect he

was liable therefor. In the instant case plaintiff, a tenant, was injured by falling upon ice at the foot of an outside stairway to the building, used in common with other tenants and under the control of the landlord, and the questions of whether the proximate cause of the injury was the accumulation of the ice, and whether defendant had known of defects in the water pipes, from which the water was discharged onto the steps and froze, for such length of time as to require him in the exercise of reasonable care to remedy the same, were for the jury.

Appeal from Polk District Court.—HON. JAS. A. HEWITT, Judge.

MONDAY, JUNE 10, 1912.

ACTION for damages resulted in a directed verdict for defendant, and judgment thereon. The plaintiff appeals.—*Affirmed.*

S. B. Allen and E. D. Perry, for appellant.

J. M. Parsons, for appellee.

LADD, J.—The defendant owns a two-story brick building at the northwest corner of Cottage Grove avenue and Nineteenth street, in Des Moines. Entrance to the upper story is by a stairway from Cottage Grove avenue on the south, from the top of which a hallway extends to the north, with four rooms on each side. At the north end of this hallway was a door opening onto a covered landing, from which an outside stairway extended along the end of the building toward the east to the ground. On the outside of this stairway was a railing, about two and one-half feet high, with boards extending parallel therewith part of the way, fastened to the posts and spindles the rest of the way. A roof of boards and tar paper, with a board next to it, covered the stairs, except the last two steps; the space between the board and railing being open. The plaintiff oc-

cupied a room in the second story as tenant, and the other rooms were also rented to different persons. These rooms were heated by stoves, and the tenants carried ashes and refuse out by way of the back stairway and necessary coal up from bins below. On December 5, 1909, at about 6 o'clock in the afternoon, in going down the back stairway to empty some ashes, the plaintiff, in the manner hereinafter described, caught her heel when she reached the bottom step and fell, sustaining serious injuries. In this action she claims damages, alleging her own freedom from negligence, and that the covering of the stairway was negligently constructed, as well as the spouting, and, by way of an amendment, "that the spouting at the north end of the said building was permitted to get out of repair, so that the water ran therefrom upon the cover to said stairway, and the covering to said stairway was permitted to get out of repair, so that the water thrown thereon from the aforesaid spouting ran down between the covering to said stairway and the building upon the steps where plaintiff was injured; that the said downspout was permitted to get out of repair by defendant herein, so that the said water, which was concentrated at or near the steps where plaintiff was injured, gushed out of said downspout upon the said steps where plaintiff was injured and froze thereon; and the spout at the end of the cover to the stairway was also permitted by the defendant to get out of repair, and because thereof the water ran therefrom upon the steps of the said stairway where plaintiff was injured." The answer was a general denial.

At the conclusion of the introduction of evidence in behalf of plaintiff, a motion to direct the jury to return a verdict for defendant was sustained. The grounds of this motion were (1) that no actionable negligence of defendant had been shown; (2) that the premises, in the respects complained of, were in the same condition as when plaintiff became a tenant; (3) that plaintiff "was injured by reason of

ice accumulating on the lower steps of the stairway and by slipping thereon, and that such had been the condition during the cold weather, and during all rainy times in cold weather, for more than two years previous to that, and that the plaintiff occupied the premises with the knowledge of that, and with knowledge of the means of egress and ingress to the premises''; (4) that defendant was not shown to have done anything which contributed to making the premises more dangerous than when plaintiff became a tenant; and (5) that plaintiff was a tenant at will from month to month, and could have surrendered the leased room at any time, and in staying elected to continue with conditions as they were. The court, in ruling on the motion, indicated as reasons for directing a verdict that it did not appear (1) that ice on the steps was the cause of plaintiff's fall; (2) nor that the accumulation of ice, if any, was caused by the leaking of a pipe or pipes; (3) nor that defendant had notice of the condition of the step prior to the injury.

It will be observed that assumption of risk was not pleaded as a defense, and that contributory negligence was not made a ground of the motion to direct a verdict. Neither of these was referred to in the court's ruling, and, though argued by appellant, requires no attention.

Nothing is claimed because of the alleged negligent construction, and, of course, could not be, as conditions were in no wise concealed from nor misrepresented to the tenant in leasing the rooms. *Boyer v. Commercial Bldg. Inv. Co.*, 110 Iowa, 491; 24 Cyc. 1047. But, as the stairway was made use of by the several tenants, this remained in the control of the defendant, and she was bound to keep the same in reasonable repair; if she negligently failed so to do, and as a consequence of such failure plaintiff was injured, liability therefor attached. *Burner v. Higman & Skinner Co.*, 127 Iowa, 580; *Peil v. Reinhart*, 127 N. Y. 381, (27 N. E. 1077, 12 L. R. A. 843). *Watkins v. Goodall*, 138 Mass. 533; 24 Cyc. 1116; 18 Am. & Eng. Ency. Law, 220.

That the law is as stated is not questioned, and was so regarded by the trial court in directing a verdict; and we have only to determine from an examination of the evidence whether defendant was delinquent in the matter of repairs, and the injury resulted therefrom as a natural consequence. The roof over the stairway was of boards and tar paper, leaving the two steps at the bottom uncovered. The evidence tended to show that a gutter and some pipes had become out of repair since plaintiff became a tenant in August, 1907.

She testified that:

At the east end of the roof there was a gutter, but it was not connected; and there was a pipe run from that to the downspout, . . . and coming down from that was a round tin pipe, which went over to the downspout at the corner of the building; that afterwards the downspout bursted, and defendant had it run under the sidewalk into an earthen pipe; that the pipe at the east end of the stairway had leaked for some time; and that the husband of defendant, who saw to making repairs, promised repeatedly to have same mended, and when he did the leak was not stopped, and the water came out on the steps just the same. . . . There was a little spouting at the east end of the porch (over the stairway); but it didn't connect in some way, *and let the water come down on the steps*. When I first went there, there was a tiling in this downspout. That froze and broke. Mr. Houghton repaired that, or repaired at it, and took a piece of tin and fixed it, and had a wire around it—you could move it up and down—and the water used to spout out that way and over onto the steps, out between the tiling; it didn't fit in. It was in that condition when I was hurt. It didn't do that when I first went there. *The water run down between the porch and the building and onto the step*. I don't think it was in that condition when I went there. *The spout at the east end of the top to the stairway was in a leaky condition; right up in there where it should have been fastened, it wasn't fastened at all*. That was not there to my knowledge when I went there. The water came down from the roof on the porch. *It went in there and didn't fit, and down at that place down by the steps—I mean the down-*

spout. He fixed that place, after being asked to, the spring before I was hurt, but left it in the same condition. It leaked just the same, and was never corrected.

On December 5, 1909, at 6 o'clock in the afternoon, she;

Was going down the back stairway to empty my ashes. I had them in the ash pan that belonged to the stove. I put on a new pair of rubbers, my red shawl, my sunbonnet, my mittens, and took up my ashes and walked out; started down the back stairway. I had my ashes in my right hand, and left hand on the railing. I went down step by step, and when I got to the bottom of the steps something caught my foot. My foot slipped, caught my heel, and I held onto the railing then as long as I could, and I fell and broke my leg, and I slipped down and went over into the sidewalk that belongs to the private alley. I could not see what I fell on. *I could feel that ball of ice, or whatever it was caught my heel.* I had rubber heels on my shoes. It caught my heel of my foot and pulled it right backwards and sprained my ankle. *This ice was down on the bottom, or next to the bottom step—down where that water accumulated.* I fell right on the place where my foot caught. My foot pulled right back, and I held on as long as I could; and when I let go, then it let go of my foot, and I fell. *I fell where this ball of ice was.* It pulled my foot right back.

She had observed that the ice accumulated there every time it rained and froze, but not when she first occupied the room. Before going down that evening, she knew the steps had ice on them, but not the accumulation she found. She proceeded:

I think it had rained that day, sleeted and snowed. It was a stormy day. Saturday it was kind of drizzling, misting more like. It must have continued Sunday, because I know it sleeted. There was always ice there when it rained, or any kind of sleet. . . . This water that accumulated in ice that formed the ridge or chunk I fell on came from that porch right there where that little space was, and didn't fit in, and down where that little pipe that went into the drain that had a little wire on it. When we had a real hard rain, it would come down there and fly up like that—we used

to call it a little fountain—and go on the steps right down there on the pavement.

She testified further, on cross-examination, that;

This gutter came to the east end of the stairway roof, that is the gutter from the roof. That is the spouting. I don't know whether it was an open gutter or not. There was a gutter there. So far as I know, I never saw it changed. It was an ordinary gutter, raised at the north end and running off south towards the building, and coming down from that was a round tin pipe. It went down to the corner of the building. It sort of went off southeast and struck a big pipe. He put it in the spring after I came there. I came there in 1907. Q. Did it get colder Saturday night? A. I don't remember whether it did; I know it did Sunday. I slept so sound Saturday night that I don't remember. Q. You slept so sound you do not know whether it got colder or not, but you know it was colder Sunday? A. Yes. Q. And you know it was colder during the day? A. I didn't pay no attention to whether it was colder. Q. Which way was the wind from that day? A. I don't remember. Q. You couldn't remember at all? A. No; but I don't think it was from the north. Q. Do you think it was from the east? A. If I was just thinking, I should say it was from the south. . . . I cleaned off the steps myself Saturday. Took my broom handle and cleaned them.

Another witness testified that "when the water came down the downspout it always left a lot of ice on the lower steps there. I cannot say for sure where it came from, because I did not pay a great deal of attention to it; but some of the water seemed to come from that spout, and the rest seemed to come from between the wall and the building; it leaked down. There was an open place between the wall and the building, where the water came on the stairs and ran down until it got to the street. The ice accumulated most about the two or three lower steps."

This recital of the evidence leaves no doubt but that it was sufficient to carry the issue to the jury as to whether

the injury was the proximate result of the accumulation of ice on the steps. So, too, was the issue for the jury as to whether defendant had known of the defect in the water pipe or pipes long enough, so that these might, in the exercise of ordinary care, have been repaired previous to the injury. Plaintiff testified that she had repeatedly directed Houghton's attention to the alleged defects when paying the monthly rental, and that, though promising repair, nothing was done, and had also spoken of the matter to defendant. That she (defendant) may not have been aware of the accumulation of ice on the step, if such there was—that is, of the consequence of her alleged negligence—is not material. See 24 Cyc. 1120; 18 Am. & Eng. Ency. Law (2d Ed.) 222. The real difficulty in the case is to determine whether the ice causing the injury accumulated as a consequence of the exposure of the steps to the drizzling and the sleet of Saturday and Sunday, after plaintiff had cleaned these, or whether water had escaped from the pipe because of being out of repair and frozen into the ice on which plaintiff slipped. If, owing to the storm, any water was running through the pipes at that time of year, the record is silent concerning it, and certainly the storm was not so described that this may reasonably be inferred therefrom. Ordinarily at that season of the year the thermometer is likely to be at or below the freezing point, and water not likely to be flowing from the eaves when sleet is forming. That the steps were exposed to the weather explains the conditions of the stairway, and there is but a scintilla of evidence, in the nature of a conclusion or opinion of the witness, directly attributing it to the alleged defect in the pipe. We are not inclined to interfere with the ruling that this was not sufficient to carry the case to the jury. *Affirmed.*

W. E. DAY, Appellant, v. H. S. MERRICK.

False representations: SALE OF LAND: DEFICIENCY IN ACREAGE: EVIDENCE. In this action for false representations as to the number of acres contained in the farm sold plaintiff, the evidence is reviewed and held to entitle plaintiff to recover, because of the fraud practiced both by defendant and his agent, regardless of whether the land was sold by the acre.

Same: FALSE REPRESENTATIONS OF AGENT: RATIFICATION. By accepting the benefits of the sale the owner of land ratifies the fraudulent representations of his authorized agent and is bound thereby; especially where he knew, as in this case, what the representations were.

Appeal from Wapello District Court.—HON D. M. ANDERSON, Judge.

THURSDAY, NOVEMBER 14, 1912.

THE facts are stated in the opinion.—*Reversed and Remanded.*

Gillies & Daugherty and Hammett & Howard, for appellant.

Tisdale & Heindel and W. P. Cave, for appellee.

SHERWIN, J.—The plaintiff is, and was at the time of the transactions involved herein, a resident of Randolph county, Mo., and the defendant was then, and is now, a resident of Ottumwa, Iowa. In the fall of 1905, and for some time prior thereto, the defendant was the owner of a farm in Randolph county, Mo. Hick & Yutz, real estate agents,

1. FALSE REPRESENTATIONS: sale of land: deficiency in acreage: evidence.

residing at Macon, Mo., had charge of this farm as agents of the defendant to the extent, at least, of renting and collecting the rents, and had at one time during the period prior thereto in the presence of the defendant sought to find a purchaser for the land without objection from the defendant. In the fall of 1905, Hicks & Yutz advertised the farm for sale in a local paper, describing it as containing three hundred and thirty-five acres. The plaintiff saw and answered the advertisement, and about the 1st of November, 1905, Mr. Yutz took the plaintiff over a part of the farm and showed it to him, priced the farm at \$10,000, and stated that it contained three hundred and thirty-five acres. The farm consisted of a more or less broken tract of land approximately one and one-half miles in length and half a mile wide at its greatest breadth, having a winding creek for a boundary on the northeast side for about three-quarters of a mile. Along the creek were high bluffs covered with timber, while further west the creek turned and crossed the farm from north to south. It is apparent from the record that it would be utterly impossible for any one to determine the number of acres in the tract merely by looking at it, or by going over it. Nothing came of the negotiations at that time. In December, 1905, one Aubrey R. Hammett began negotiations for the purchase of the farm through Hicks & Yutz, and several letters passed between them relative thereto. The negotiations proceeded on the basis of \$26 per acre for the farm, but Hammett was not satisfied to pay for the land on the basis of three hundred and thirty-five acres, without first knowing that the farm contained that number of acres, and he employed a surveyor to survey and determine the matter. After the survey had been made, and on January 13, 1906, he wrote the letter following, and mailed one copy thereof to the defendant at Ottumwa, Iowa, and another copy to Oswald Hicks, of the firm of Hicks & Yutz, at Macon, Mo.: "H. S. Merrick & Oswald Hicks, Gentlemen: Mr. Williams, the gentleman

I got to survey the Bradshaw farm, has just completed his survey and calculations thereof and makes same more than forty acres short of three hundred and thirty-five acres. The shortage is so great as to suggest a possibility of a mistake, yet he may be correct and if so, I can't stand such a shortage. I am perfectly willing to take the land at \$26 per acre and let you name a surveyor and me one and have the two survey the farm and I will pay all the expenses in any way pertaining to the same, but feel sure you would not expect me to pay for forty-odd acres I did not get." On January 22, 1906, Mr. Hammett again wrote Mr. Hicks as follows: "Dear Sir: I think Bradshaw is responsible to you for the shortage in the farm and you are the people to ask for a reckoning. You paid for three hundred and thirty-five acres, it was represented to you as being three hundred and thirty-five acres, you relied upon the representations to your damage and are the innocent injured as it were. Now, it is different with me; I have surveyed and found out that there is a shortage and am not relying upon anybody's representations, but upon my own knowledge and for me to buy your cause of action would be buying lawsuits, a thing I don't want to do." And again, on the 25th day of January, Hammett wrote Mr. Hicks in regard to the land, and sent him copies of two surveys of the farm, both of which showed that there was much less than three hundred and thirty-five acres therein. January 26, 1906, Mr. Hicks wrote Hammett as follows: "Dear Sir: I am in receipt of your field notes in reference to the Bradshaw survey, for which I thank you and would be glad to pay for same if you will send me your bill. . . . All we wish is a corner to start from. . . . I have had a consultation with Mr. Merrick by letter and it is useless to consider or think of getting him to accept less than \$8,710 for the farm; however, he might knock off the ten dollars, and assign all cause of action against Mr. Bradshaw to you, if there should be any, or the suit could be brought in our name if necessary, but as a matter of fact I

do not believe Mr. Bradshaw would hesitate to make the shortage good if the matter was brought before him. . . . We have a contract with Mr. Bradshaw upon which this deal was made which calls for three hundred and thirty-five acres without qualification."

The negotiations between Hammett and Hicks ended at that time. Early in January, 1906, the plaintiff herein again opened negotiations for the farm by correspondence, and on January 20, 1906, wrote Hicks as follows: "Referring to yours of January 14th, will say that if the farm can be bought between \$25 and \$26 per acre, I will come and see you. If not, it will not be worth while to consume your time coming up." It will be noticed that this letter was written seven days after Hammett had written to the defendant and Hicks, notifying them of the shortage in the acreage of the farm. On January 22d, Hicks wrote the plaintiff as follows: "We have yours of 20th, 1906. If you will come up, we think there is no trouble in making a deal for \$8,710.00, which is \$26.00 per acre." On the 29th day of January, 1906, the plaintiff and Hicks agreed upon terms for the farm, and Hicks drew a contract covering the matter, which was signed by the plaintiff and forwarded by Hicks to the defendant in Ottumwa, Iowa. The description of the land in the contract was as follows: "All of the north half of the southeast quarter of section 19, and two hundred and fifty-five acres being all that part of the south half of section 20, that lies south and west of Walnut creek, all in township 55, range 15, containing in all three hundred and thirty-five acres, it being the intention of the said Henry S. Merrick to deed and convey to the said Day all of the interest which the said Herrick may have in and to the lands in the above sections, which were conveyed to the said Merrick by one Thomas H. Bradshaw and wife, Annie L. J. Bradshaw, by their deed of conveyance made on the 15th day of March, 1905, and recorded in Book 75, page 590 of the Records of the Recorder's office of Randolph county,

Missouri. In other words, the said Merrick is to convey the identical and exact number of acres to the said Day, which the said Merrick bought in the above-mentioned deed from Bradshaw." The deed from Bradshaw and wife to Merrick referred to in this contract conveyed: "The north half of the southeast quarter of section 19, township 55, range 14, and two hundred and fifty-five acres, being that part of the south half of section 20 that lies south and west of Walnut creek . . . and containing in all three hundred and thirty-five acres." The eighty acres in section 19 is a full eighty; the shortage being in the tract in section 20. The contract was sent to the defendant for his approval and signature, and was received by him. He did not sign it, however, but he at once made a deed to plaintiff on the terms stated in the contract, and forwarded it to Hicks, with authority to deliver same to plaintiff and collect the purchase price. Hicks notified the plaintiff, and in due time plaintiff accepted same and paid the full consideration agreed upon in the contract. In his deed the defendant carefully avoided stating the number of acres in the farm and limited the general warranty clause by writing in with a pen these words, "claiming by, through, or under him." It was not until some time after he had purchased and paid for the farm that plaintiff learned that the farm did not contain three hundred and thirty-five acres, and, after he had failed in an attempt to have the defendant adjust the wrong without litigation, this suit was brought to recover damages sustained by reason of false and fraudulent representations. The evidence was presented to a jury, but at its close the court sustained defendant's motion for a directed verdict, dismissed the case, and rendered judgment against the plaintiff for costs. The plaintiff appeals. The facts as we have recited them, and they are without serious dispute, are the strongest argument that can be made against the action of the trial court. The evidence of fraud on the part of Hicks is practically conclusive. The evidence tending to show that

he was the defendant's duly authorized agent is ample to warrant a finding that he was such agent.

But, if such were not the case, the evidence of fraud on the part of defendant himself is sufficient to take that question to the jury. The defendant had the contract before him when he made the deed. He was familiar with its contents, and could not help knowing therefrom that the plaintiff was bargaining for three hundred and thirty-five acres, and expecting to get such acreage for the sum that he had agreed to pay for the farm. The defendant at that time knew that the farm did not contain the number of acres named in his deed from Bradshaw and in the contract that the plaintiff had signed, and, having accepted the terms thereof it was for the jury to say whether or not in executing the deed in the manner he did, he was endeavoring to perpetrate a fraud regardless of the acts of his agent Hicks. The evidence tends to support the claim of the plaintiff that he purchased the farm by the acre and not in gross but, whether he did so or not, he is entitled to recover because of the fraud practiced by the defendant himself and by his agent. *Thomas v. Beebe*, 25 N. Y. 244; *Starkweather v. Benjamin*, 32 Mich. 305; *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656); *Antle v. Sexton*, 137 Ill. 410 (27 N. E. 691); *McGhee v. Bell*, 170 Mo. 121 (70 S. W. 493, 59 L. R. A. 761.)

Furthermore, there is abundant evidence to sustain the proposition that the defendant ratified the fraudulent acts

of his agent Hicks. By accepting the benefits of the transaction, he bound himself by the representations, and particularly is this true

where the principal knows what such representations were, as did the defendant here. *Higbee v. Trumbauer*, 112 Iowa, 74; *Lull v. Bank*, 110 Iowa, 537; *Deering v. Bank*, 81 Iowa, 222; *Eadie, Guilford & Co. v. Ashbaugh*, 44 Iowa, 519; *Busch v. Wilcox*, 82 Mich. 336 (47 N. W. 328, 21 Am. St. Rep. 563). That his cause should have been submitted to the jury is very clear to us. See *Lenoch v. Yoss*, 157 Iowa, —.

2. SAME: false
representations
of agent: rat-
ification.

The judgment is reversed, and the case remanded.
—*Reversed.*

ARCHIBALD BLACK, Appellee, v. H. C. MILLER, Administrator
of the Estate of GEORGE BLACK, Deceased, Appellant.

Estates of decedents: CLAIMS: WITHDRAWAL: REFILING. After filing
1 his claim against the estate consisting of several items, claimant served notice of the claim upon the administrator, stating therein that all but two of the items were for the present withdrawn and would be withheld until the court passed upon his petition in another action, in which he claimed a conveyance of certain land in consideration of services covered by the withdrawn items, and that the other items would come on for trial. *Held*, that the withdrawn items were not dismissed from the claim as filed, but even if they were, the estate remaining unsettled, claimant was entitled under the circumstances to refile the same by an amendment after disposition of the other action.

Same: FORMER ADJUDICATION: ESTOPPEL. In a former action by de-
2 cedent's children to partition certain real property, claimant pleaded an oral agreement with decedent to convey to him certain of the land in consideration for the care and support of decedent during his natural life. His claim as made in that action was dismissed as being without support in the evidence, and without any reservation whatever of his rights in the premises. *Held*, that the decree was an adjudication barring his right to recover on a claim against decedent's estate for the reasonable value of the same service.

Specific performance: DISCRETION. Specific performance of a contract
3 is not a remedy which a litigant may demand as a right, but it rests in the sound discretion of the court; where, however, the evidence is sufficient and there are no equitable considerations in the way such decrees are entered as a matter of course.

Negotiable instruments: GENUINENESS OF SIGNATURE: PROOF. Where
4 the original note upon which an action is founded, or a copy thereof, is attached to the petition, the genuineness of the signature to the note will be presumed, unless denied under oath by the person whose signature it purports to be; but where neither the original nor a copy was attached to a claim filed against the estate, and all items of the claim were denied, the burden was upon claimant to establish the genuineness of the signature to the note before its admission in evidence.

Instructions: PRESERVATION OF EXCEPTIONS. The statute authorizes the
5 reporter to note in his report of the trial, in shorthand or in
writing, the fact that the jury is instructed and all exceptions
and objections to the instructions given by the court on its own
motion, and this report when properly certified is sufficient evi-
dence of the taking of exceptions to the instructions; but there
is no authorized preservation of the record of exceptions by the
mere certificates of the judge and reporter that they were taken.

Instructions. The trial judge in his instructions should clearly state
6 the issues rather than copy the pleadings as a part thereof; and he
should not assume the genuineness of decedent's signature to a
note sought to be proven against his estate.

Use and occupation: PRIMA FACIE CASE. To establish a claim for the
7 use and occupation of decedent's land, it is not necessary for the
administrator to show that there was a mutual understanding that
decedent was to receive pay for the use of the land. Proof that
the occupant entered upon the land, used and occupied it for his
own benefit, with the assent of decedent, implies a promise to pay
the reasonable value of the use, in the absence of proof that the
use had been paid for or that it was gratuitous; and such defense
must be pleaded to be available.

Same. The rule with respect to the rendition of services by a relative
8 living in the family has no application to a claim against an
occupant of decedent's land for its use while decedent was living
with and being supported by the occupant.

Appeal from Jefferson District Court.—HON. M. A. ROBERTS,
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

THE claim of plaintiff was allowed against the estate of
George Black, deceased, in the sum of \$2,500. The adminis-
trator appeals.—*Reversed.*

Crail & Crail, for appellant.

Leggett & McKemey, for appellee.

LADD, J.—The plaintiff filed his claim against the estate
of George Black, deceased, March 10, 1908, consisting of sev-

enteen items. The first fourteen items, except the twelfth, related to purchases for or improvements on land. Item fifteen related to the amount claimed to be due on a note, and the twelfth item was for money borrowed. The sixteenth item was for services in caring for stock and work on the farm, and the seventeenth was for "board, washing, and mending twenty years, 1,040 weeks, at \$1.50 per week, \$1,560."

In September, 1908, term of the district court the plaintiff caused to be served on the administrator notice of the filing of the claim, and "that the items of said claim except Nos. twelve and fifteen are for the present withdrawn," and that the claim in respect to the said items would come on for hearing on the 5th day of October, 1908, and "that the remaining items of said claim are withheld until the court passes upon the petition of said Archibald Black and wife to quiet his title" to sixty acres of land described, which lands George Black agreed to convey to said Archibald Black in consideration of the services covered by said remaining items of the claim. No trial was had at the time stated, and on November 12, 1910, plaintiff filed what is designated as an "amendment to claim," alleging therein that he amended "his claim heretofore filed against this estate by changing the seventeenth item of the claim so it will read as follows: First. '(17). Boarding, washing, and mending, twenty years, 1,040 weeks, at \$3 per week, \$3,120, total amount of claim, \$5,170,' and files again the claim as amended. Second. He shows that this claim was not filed heretofore in the present form, because of the pendency of certain litigation in this court in reference to the partition of the real estate of said George Black, in which this claimant presented the claim to sixty acres of land under the verbal agreement of the deceased; that claimant should have the same in consideration of the services hereinbefore stated; that said cause was pending in the courts of this state until the — day of —, 1910, when the same was determined by the court's finding against the claim of this claimant of said land, on the ground that same was not sus-

tained by sufficient evidence to comply with the rules of the court in such cases." The defendant answered denying each item of the claim and that the estate was in any wise indebted to claimant, and pleaded that the claim was not filed within a year after the appointment of defendant as administrator of the estate of deceased and that the circumstances alleged were not sufficient to authorize the filing of the claim thereafter. The answer also pleaded a former adjudication and interposed a counterclaim for the use and rental of the land. To this answer the claimant filed a demurrer in several grounds: (1) That the claim for the items in controversy was never withdrawn. (2) That, as the claim was filed within six months after the appointment of the administrator, claimant was entitled to prove the same. (3) That the record affirmatively showed equitable reasons sufficient to excuse delay in the time of filing the claim, if delay there was. (4) That the facts pleaded did not constitute a former adjudication. The demurrer was sustained, and we shall first dispose of those grounds assailing the claim as filed.

I. It will be observed that the several items of the claim were only "for the present withdrawn," and that the two excepted items were to come on for trial; and further on the notice recites that "the remaining items of said claim are withheld until the court passes upon the petition of said Archibald Black and wife to quiet his title in sixty acres of land," describing it. Plainly enough the purpose of the notice was to bring the two items on for trial, and in doing so to withdraw the others from the trial, but not from the claim as filed. Whether this might be done is not important, for the proposed trial did not proceed and the claim continued on file as before the service of the notice. We are of the opinion that the items thereof were never actually withdrawn from the claim, and that even if they were, under the circumstances disclosed, i. e., that the estate was unsettled, that the two items were undisposed of, and the amendment filed within five

1. ESTATES OF
DECEDENTS:
claims: with-
drawal: refill-
ing.

months after the final disposition of the case, involving the same matter, presents a case calling for equitable relief in permitting the filing of the amendment to the claim more than one year after the appointment of the administrator and when it was filed. See *Asher v. Pegg*, 146 Iowa, 541.

II. In count 3 of the answer the defendant plead the decree in *Black et al. v. Chase et al.*, 145 Iowa, 715, as *res adjudicata* and by way of estoppel. The petition in that action was by three children of the deceased praying for the partition of two hundred acres of land left by him. Three other children, Samuel, George, and Arch, set up claims to forty acres each, and subsequently Arch (with his wife) amended his answer by alleging an oral agreement with deceased, said to have been made in 1886, whereby they were to make their home with, care for, and board deceased during the remainder of his life, and as compensation therefor to have sixty acres of land, that they had performed the contract, and prayed that title to said land be quieted in Arch, or the administrator be required to execute a deed therefor, in compliance with said agreement. On hearing, the several forties were held to belong to those claiming them, but the amendment of Arch Black to his answer, setting up said agreement and praying for the conveyance of the sixty acres in compliance therewith, was dismissed and decree entered "that the claim of Arch Black to own sixty acres is without merit and not substantiated by the evidence."

In this action Arch Black presented his claim against the estate of the deceased for the care and board alleged in said amendment during precisely the same period, and prayed that it be established for the value thereof. The evidence relied on was the same in both cases, save that in the last trial proof of the reasonable value of such board and care was adduced. The only evidence of deceased's expectation to pay for the board and care introduced on the last trial was that of his agreement to give Arch the sixty acres of land alleged

in the amendment to the answer in the first action. So that in each trial the claimant herein relied on the same proof of furnishing care and board and upon the alleged agreement to pay therefor by transferring the sixty acres of land, in the former praying that he have the land as compensation, and in the latter that payment therefor be from the funds of the estate. In other words, the issues in both actions are the same; the relief sought only being different. It is plain enough that, had the issues now being tried been first determined, the decision would have been conclusive in an action for specific performance. Is the converse true?

Of course, to recover in this action, proof that the board and care were furnished with the mutual expectation of the father to pay, and the son to receive, compensation therefor, would be sufficient. *Tank v. Rohweder*, 98 Iowa, 154; *Weitnaur v. Weitnaur*, 117 Iowa, 578. But no testimony of this character was introduced, save as this might be inferred from the evidence of a promise that the son should have the land. Under the evidence, then, if there was to be compensation at all, this was to be the land, and the measure of recovery should be the land, or, in event this cannot be conveyed, then clearly enough claimant would be entitled to its value. It may be conceded that the causes of action are different, the one having been prosecuted in equity and the other at law, the relief sought in one being specific performance and in the other compensation by way of damages, but the same essential issues were involved in each: (1) The existence of the contract and (2) the performance of the services. These were determined in the former action, for there was a hearing and no reservation in dismissing the cross-bill.

Where there is a hearing, and no such words as "without prejudice" appear in the decree, and no reason for dismissal is stated therein, and a decision on the merits is in no wise negatived, the issues raised are presumed to have been heard and decided on the merits. *Durant v. Essex Co.*, 7 Wall. 107, (19 L. Ed. 154); *Carberry v. Railway*, 44 W. Va. 260, (28 S.

E. 694); 2 Black on Judgments, section 720. See *Finch v. Hollinger*, 46 Iowa, 216; *Hahn v. Miller*, 68 Iowa, 745. Says Story, in his Equity Pleading (793): "A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismissal was upon the hearing and was not in terms directed to be without prejudice." It was said in *Taylor v. Yarbrough*, 13 Grat. (Va.) 183: "A bill in equity having been dismissed generally without a reservation of any right of the plaintiff to sue thereafter, is conclusive upon all the issues made up in the case." An error may be predicated on the omission to so indicate in the decree dismissing a cause on hearing if this is done for want of jurisdiction or other cause not going to the merits. Freeman, Judgments, section 270A; 2 Black, Judgments, section 720. The circumstance that the former suit was in equity and that now considered at law is not material, as both are triable in the same court. *Madison v. Garfield Coal Co.*, 114 Iowa, 56; *Bruce v. Foley*, 18 Wash. 96, (50 Pac. 935); *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

That the issues essential to recovery by the claimant in this action were decided against him in the former suit is put beyond controversy by the record and ordinarily must have been regarded as conclusive in support of the plea of estoppel. *Madison v. Garfield Coal Co.*, 114 Iowa, 56; *Reynolds v. Babcock*, 60 Iowa, 289; *Stevens v. Wadleigh*, 6 Ariz. 351 (57 Pac. 622); *Southern P. R. Co. v. U. S.*, 168 U. S. 1 (18 Sup. Ct. 18, 42 L. Ed. 355), 23 Cyc. 1218. But appellee would obviate this result by saying that, whereas strict proof was exacted to make out a case in the former suit, it was only necessary to establish his claim in this action by a preponderance of the evidence; and further that, in prosecuting the former suit, plaintiff merely mistook his remedy, and, though defeated, may demand an appropriate remedy in a subsequent action. The last proposition may be disposed of on two grounds: (1) The claimant did not fail in the former suit because of having mistaken his remedy but owing to a failure of proof, and (2) even if

there were a mistake in the remedy sought, the essential facts to sustain his claim to a different remedy were conclusively adjudicated against him in that action.

Nothing contained in the decisions cited by the appellee indicates that the conclusive character of a decision of an issue in a former suit is obviated by the circumstance that the plaintiff might have prosecuted a different action or have sought a different remedy. In *Zimmerman v. Robinson & Co.*, 128 Iowa, 72, it appears that plaintiff's assignor had prosecuted an action for the recovery of the price paid on a machine on the theory that the contract of purchase had been rescinded, and it having been decided on appeal that, as the machine had not been returned or a return tendered, recovery might not be had (*Zimmerman v. Robinson*, 118 Iowa, 117), it was held that the prosecution of that action was not an election of a remedy inconsistent with the maintenance of an action for a breach of warranty in the contract. Manifestly there was no issue decided in the one action, which was essential to the maintenance of the other, and this was true in *Lemon v. Sigourney Savings Bank*, 131 Iowa, 79, where an action was first prosecuted against the bank for the amount of deposit which it appeared had been paid by the defendants in notes of third parties payable to the plaintiff, and it was held that this was not an adjudication constituting an estoppel in a subsequent suit against the bank for the proceeds of these notes collected by it.

Not a single issue involved in the first action was raised in the second. In *Asher v. Pegg*, 146 Iowa, 541, the plaintiff, under the name of Margaret Pegg, asserted the right to a widow's share in the estate of the deceased, and, this having been denied, she prosecuted a claim against the administrator of the estate for services rendered by her to deceased as housekeeper and assistant in carrying on his farm, and the court held that there was no identity whatever "either of law or fact between the claim asserted in the former action and the one which is now being asserted." The circumstance

that a person may have availed himself of a different remedy does not obviate the principle that that which has once been judicially determined shall not again be made the subject of judicial controversy. See *Reynolds v. Lyon*, 121 Iowa, 733. The failure of plaintiff in the former action was not owing to mistake of remedy, for that demanded was specific and precisely that to which he was entitled, if any. True, the adverse decision may have been owing to the *quantum* of proof exacted, for to have succeeded he must have established the contract as well as its performance by clear, definite and convincing evidence. *Chew v. Holt*, 111 Iowa, 362; *McDonald v. Basom*, 102 Iowa, 419; *Briles v. Goodrich*, 116 Iowa, 517; *Moore v. Pierson*, 6 Iowa, 279. This does not mean that the facts must be proven beyond reasonable doubt. *Skeggs v. Horton*, 82 Ala. 352 (2 South, 110) and *Sherrin v. Flinn*, 155 Ind. 422 (58 N. E. 549). But may amount to no more than saying that a higher degree of proof than exacted in actions at law is essential to constitute a preponderance of evidence. *Schmuck v. Hill*, 2 Neb. (Unof.) 79 (96 N. W. 158).

Whatever the explanation, more evidence was necessary to make out a case in the former suit than was essential to establish the right to recover for services rendered on the claim filed against the administrator. But the claimant voluntarily selected the forum in which to litigate his claim under the alleged contract, and our attention has not been directed to any decision holding that the effect to be given to a judicial decision depended on and is to be measured by the *quantum* of proof exacted. It is said that acquittal of a person in a criminal action is not conclusive in a civil action involving the same issue unless for a forfeiture, penalty, or the like exacting the same amount of proof, and the reason sometimes given is that the matter of motive or intent differentiates the two classes of actions, and at others that the evidence determinative in a criminal action is more than sufficient to support a civil action. In other words, the evidence might preponderate against the defendant and yet not be sufficient to exclude

all reasonable doubt. See *Stone v. U. S.*, 167 U. S. 184 (17 Sup. Ct. 778, 42 L. Ed. 130), explaining *Coffey v. U. S.*, 116 U. S. 436 (6 Sup. Ct. 437, 29 L. Ed. 684); *State v. Meek*, 112 Iowa, 338.

But the state never prosecutes a civil action based on a criminal act save for forfeiture, penalty, or the like, and for this reason the parties in criminal and civil actions are never the same. Because of diversity of parties, an adjudication in a criminal prosecution is not binding in the subsequent civil action instituted by an individual for the recovery of damages consequent of the wrongful act. Often several different actions may be maintained on a particular state of facts, and the *quantum* of evidence exacted in each is a matter to be considered in selecting the remedy to be sought and the forum in which to seek relief; but the determination of the issues presented is not any less binding on the parties because decided in one form of action rather than another. The fact that the issue has been decided by a court having jurisdiction of the parties and the subject-matter is that which renders the decision effective in support of a plea of an estoppel interposed in a subsequent action between the same parties involving the same issue. The amount of proof essential to establish an allegation of the petition, like the burden of proof and other matters, is a mere incident to the trial, exacted as the result of long experience as best adapted to the ascertainment of truth. Whatever the *quantum* of evidence required to establish a fact, or on whomsoever the burden of proof, the adjudication is binding on the parties and cannot again be litigated if properly interposed as a defense.

Cases like *Gwin v. Sumur*, 49 Mo. App. 361; *Porter v. Wagner*, 36 Ohio St. 471, 475, and *McNamara v. Arthur*, 1 Ball & Beatty, 175, are sometimes cited as sustaining a different view; but none of these were determined on the merits.

Many cases may be found in which a different *quantum* of evidence was required; but this was given no consideration in determining whether the decision of the issues involved

sustained the plea of estoppel. As bearing hereon, see *Wolverton v. Baker*, 86 Cal. 591 (25 Pac. 54); *Bruce v. Foley*, 18 Wash. 96 (50 Pac. 935); *Trayhern v. Colburn*, 66 Md. 277 (7 Atl. 459); *Fidelity, etc., Trust Co. v. Fridenburg*, 175 Pa. 500 (34 Atl. 848, 52 Am. St. Rep. 851); *Myers v. Kingstone Coal Co.*, 126 Pa. 582 (17 Atl. 891). To hold otherwise would permit a party to experiment with different forms of action in enforcing the same right and impair the force which always has been and should be given to solemn adjudication of issues properly raised and regularly decided. Of course, the evidence adduced on the hearing of causes in equity is frequently thought not to be of the conclusive character essential to warrant the relief prayed and a dismissal entered for that reason. Such a decree is negative merely, and it may be that the recitals would be construed as a sufficient reservation of the issues for an action at law—a point not now necessarily to be determined, for the decree in the former suit purported to be on the merits.

Specific performance has never been regarded as a remedy to be claimed by a litigant as a right, but is said to rest in the sound discretion of the chancellor. Where the evidence is sufficient, however, and there are no equitable considerations in the way, such decrees are entered as a matter of course. *Baltimore, etc., R. Co. v. Brubaker*, 217 Ill. 462 (75 N. E. 523); *Rogers v. Saunders*, 16 Me. 92 (33 Am. Dec. 635); *Yazoo, etc., R. Co. v. Railway*, 83 Miss. 746 (36 South, 74); *Shuman v. Willets*, 17 Neb. 478 (23 N. W. 358); *Steadman v. Handy*, 102 Va. 382 (46 S. E. 380); 36 Cyc. 550.

There were no peculiar equities in the former suit obstructing the granting of specific performance, and, as recited in the decree, relief must have been denied on the merits alone.

There were no peculiar equities involved in the former suit, and the evidence was such that, had the contract and performance thereunder been proven, the relief prayed must

3. SPECIFIC PERFORMANCE: discretion.

have been granted as a matter of course. It was denied, as recited in the decree, on a finding that the claim of Arch Black was "without merit and not substantiated by the evidence." This adjudication of the precise issues now involved and essential to the maintenance of his claim against the estate of deceased is conclusive against him and should have been held to constitute an estoppel. The demurrer to the plea in estoppel should have been overruled.

III. Item 15 of the claim was a note of \$300, dated October 18, 1902, and purporting to be signed by H. C. Black, Luman Black, and George Black, the latter by his mark. This

4. **NEGOTIABLE
INSTRUMENTS:** had been assigned to claimant, and the only
genuineness of testimony tending to identify the note as hav-
signature: ing been signed by deceased was that of claim-
proof. ant, who testified as follows: "Q. Have you

a note of George Black in your possession? A. Yes, sir; I have a note. Q. Will you be kind enough to let me see it? A. Yes, sir. (Exhibit A marked.) Q. Whose property is this note? A. Mine." The note was then received in evidence over objection as not having been properly identified, incompetent, and not binding on the administrator. The signature to a note upon which an action is founded, a copy of which has been attached to the petition, is presumed to be genuine unless its genuineness is denied by the person whose signature it purports to be, under oath. Section 3640, Code. Neither the original note nor copy thereof was attached to the claim or amendment thereto, and, as each item thereof was specifically denied, the burden of proof was on claimant to show the genuineness of the signature, prior to the introduction of the note in evidence. *Smith v. King*, 88 Iowa, 105; *Schulte v. Coulthurst*, 94 Iowa, 418. See, also, *Hay v. Frazier*, 49 Iowa, 454. It follows that the court erred in receiving the note in evidence.

IV. Appellant asserted in his abstract that exceptions had been saved to the several instructions. This was denied by appellee, and to sustain his assertion plaintiff has presented

here a copy of the certificate of the trial judge and the reporter attached to the report of the trial in shorthand, certifying that "all instructions given were duly excepted to by the party adversely affected or interested." Whether the exceptions were noted by the reporter in his report does not appear, as the transcript is not before us. Nor is it claimed that any exceptions to the instructions were preserved as required by section 3709 of the Code, or otherwise. Section 3675 of the Code authorizes the reporter to note in his report in shorthand or in writing "the fact that the jury is instructed, all exceptions and objections to instructions given by the court on its own motion," and this report, when properly certified, undoubtedly would be sufficient evidence of the taking of exceptions to the instructions. But the Code nowhere authorizes the preservation of the record of such exceptions by the mere certificate of the judge and reporter that they were taken. This would enable a party to supply the record from memory of these officers, rather than to establish the preservation of exceptions by what was done at the time. We think, therefore, that the appellant has failed to sustain the abstract in this respect by the certification of the record.

In view of another trial, however, it may be as well to suggest that the issues be clearly stated by the trial court, instead of copying the pleadings as a part of the instructions.

See *Swanson v. Allen*, 108 Iowa, 419. Also, that genuineness of the signature to the note of \$300 included in the claim ought not to be assumed in the instructions, but that this is a matter of proof.

Also, that the burden is not upon the defendant, in establishing his counterclaim for the use of the land alleged to have been occupied since 1886, to show that there was a mutual understanding between him and deceased that the latter should receive pay therefor. Upon proof that the claimant entered upon the land and used and occupied the same for his own benefit with the

5. INSTRUCTIONS:
preservation of
exceptions.

6. INSTRUCTIONS.

7. USE AND OC-
CUPATION:
prima facie
case.

assent of the deceased, in the absence of other proof, a promise to pay a reasonable compensation therefor arose. 24 Cyc. 1139. The burden of proof was on the claimant to show that use of the land had been paid for, or that its use was to be gratuitous. *Oakes v. Oakes*, 16 Ill. 106; *Sterrett v. Wright*, 27 Pa. 259. And if claimed to be gratuitous, this was a matter to be set up in the pleadings. *Saddler v. Pickard*, 142 Iowa, 691.

Of course, the relation of the parties and the circumstances under which the land was occupied are to be considered in determining the understanding between the parties.

But the rule prevailing with respect to the rendition of services to a relative living in a family has no application to such a case.

Because of the errors pointed out, the judgment is *Reversed*.

JOHN MANION, Appellant, v. P. J. BRADY and WM. S. HART.

Jurisdiction: NON-RESIDENT: SERVICE BY PUBLICATION. The statutes 1 conferring jurisdiction to render a judgment against a non-resident defendant served by publication only must be strictly and literally complied with, or the judgment and all subsequent proceedings will be void.

Same: AFFIDAVIT FOR PUBLICATION OF NOTICE. The affidavit that personal service of the original notice cannot be had on defendant in this state must be filed before publication of the notice.

Commencement of actions: SERVICE BY PUBLICATION: PROOF OF PUBLICATION. 3 The publication of an original notice for the commencement of an action must be for four consecutive weeks, either before or after filing the petition; and where the proof of publication showed on its face that it was not so published, and failed to show that it was made by the publisher of the paper or by his foreman, as required by the statute, it was fatally defective, and could not be cured by parol evidence.

Execution sale: ACTION TO CANCEL: ESTOPPEL. An attempted redemption of land sold on execution, not shown to have been prej- 4

udicial to the execution creditor, will not estop him from maintaining an action to set aside the sale.

Appeal from Allamakee District Court.—HON. A. N. HOBSON, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

SUIT in equity to set aside a judgment *in rem* and a sale thereunder. Judgment for the defendants. The plaintiff appeals.—*Reversed.*

D. Ed. Dwyer, Stilwell & Stilwell and Samson & Noble, for appellants.

William S. Hart, for appellee.

SHERWIN, C. J.—The plaintiff herein was a resident of Minnesota, and owed the defendants herein, who were residents of Allamakee county, Iowa. The defendant Brady brought a suit in attachment against Manion, and had a levy made on land in Allamakee county, in which Manion owned an equity and to which he held title. Brady obtained a judgment, and the land was sold under execution to satisfy the same; the defendant Hart finally becoming the owner thereof under sheriff's deed. The only notice of suit was by publication. The appellant contends that the statute authorizing such service was not strictly complied with, and because thereof the court was without jurisdiction to render the judgment under which his land was sold. Two specific objections are made to the jurisdiction of the trial court in connection with the question of notice. The first is that no affidavit was filed that personal service could not be made on the defendant within this state; and the second, that proof of the publication of the notice was not made as required by the statute. Within the time required by law there was filed in the case a paper, which

remained of record, of which the following is an exact copy in both substance and form:

I, William S. Hart, being first duly sworn on oath, say that I am the attorney for the plaintiff in the above-entitled action; that the defendant is a nonresident of the state of Iowa, and service of the original notice in the said action cannot be made personally upon the defendant in the state of Iowa. [Signed] Wm. S. Hart.

Subscribed and sworn to before me by the said William S. Hart this 31st day of July, 1901. _____, Clerk Dist. Court.

Plaintiff respectfully designates the New Albin Globe, a newspaper published in Allamakee county, Iowa, as the medium which he desires to have designated for the publication of the original notice in this action. [Signed] Wm. S. Hart, Attorney for Plaintiff.

Upon reading the foregoing affidavit, it is hereby ordered that publication be made in the paper above designated by plaintiff's attorney. [Signed] J. C. Ludeking, Dep. Clerk Dist. Court.

The appellant urges that this paper was not an affidavit, for the reason that it does not appear to have been sworn to, and that it amounted to no more than a declaration made in the form of a certificate. On the other hand, the appellees contend that the paper itself shows that it was sworn to, and further, was in fact sworn to, and, having been duly filed, was in fact and in law the affidavit that the law requires, notwithstanding irregularity in the jurat. On the trial, it was shown that Mr. Hart did in fact swear to the body of the paper, and that the signature of the officer was placed below the direction for publication through inadvertence or mistake.

I. It is settled, and in fact conceded, by the appellees that the statutes conferring jurisdiction to render a judgment against a nonresident defendant on service of notice by publication only must be strictly and literally complied with, or the judgment and all subsequent proceedings based thereon are void. *Schaller*

1. JURISDICTION :
non-resident :
service by
publication.

& *Son v. Marker*, 136 Iowa, 575; *Empire Real Estate & Mtg. Co. v. Beechley*, 137 Iowa, 7.

It is also the rule that an affidavit that personal service cannot be made on the defendant within this state must be filed before publication of the notice. *Carnes v. Mitchell*, 82 Iowa, 601. Whether the paper under present consideration was an affidavit within the contemplation of the statute, or such an affidavit as it requires, is, at least, very doubtful, and we shall not determine the question in view of the fact that we are agreed that the affidavit of service was fatally defective, and hence conferred no jurisdiction on the trial court.

II. The notice was published in a newspaper published in New Albin, Allamakee county, Iowa, called the New Albin Globe, and the following affidavit of such publication was made:

I, H. J. Metcalf, publisher of the Globe, a weekly newspaper published in the city of New Albin, in said county and state, do solemnly swear that the advertisement (a copy of which is hereto annexed) was published in said paper 4 consecutive weeks, the first insertion being on the 7th day of August, A. D. 1901, and the last on the 28th day of August, A. D. 1901. M. J. Metcalf, Publisher.

Subscribed and sworn to by Geo. W. Metcalf, before me, a notary public of the state of Iowa, in and for Allamakee county, this 27th day of August, 1901. Witness my hand and notarial seal. [Signed] L. Ferris, Notary Public. [Seal.]

This affidavit wholly failed to meet the requirements of the statute (Code, section 3535), which is as follows: "The

publication must be of the original notice required for the commencement of actions, once each week for four consecutive weeks, before or after the filing of the petition, in some newspaper printed in the county where the petition is or will be filed, which paper shall be determined by the plaintiff or his attorney."

2. SAME: affidavit for publication of notice.

3. COMMENCEMENT OF ACTIONS: service by publication: proof of publication.

In the first place, the affidavit on its face shows that it was not published once each week for four consecutive weeks. The first publication was made on the 7th day of August, and to comply with the statute it was necessary to publish it again on the 14th, 21st, and 28th of August. The affidavit was made on the 27th day of August, at which time but three publications had been made, and the statement therein that the notice was published on the 28th day of August was manifestly false. Proof of publication of notice each week for four consecutive weeks in a newspaper printed in the county where the petition is or will be filed must be made by the publisher or his foreman and filed before default. *Tunis v. Withrow*, 10 Iowa, 307; *Cooke v. Tallman*, 40 Iowa, 133; *Littlejohn v. Bulles*, 136 Iowa, 151; *Mortgage Co. v. Beechley*, *supra*. The affidavit also purports to have been sworn to by Geo. W. Metcalf, who was not shown to be the foreman or the publisher, or in any way connected with the paper. The statute (Code, section 3536) says that the affidavit shall be made by the publisher or his foreman, and this affidavit itself shows that it was not made by the publisher, because it is stated therein that H. J. Metcalf was the publisher.

The record must show that the statutory requirements as to notice have been complied with, and parol testimony to show matters that should appear of record is inadmissible. *Schaller & Son v. Marker*, *supra*; *Bradley v. Jamison*, 46 Iowa, 68; *Bardsley v. Hines*, 33 Iowa, 159; *Mortgage Co. v. Beechley*, *supra*; *Maynes v. Brockway*, 55 Iowa, 460. The affidavit of publication is fatally defective in two or more respects, and, under the rule that the statute must be literally complied with to confer jurisdiction by publication of the notice, it is clear that the court had no jurisdiction to render the judgment in question.

The appellee contends that the plaintiff is not the real party in interest, and hence cannot maintain this suit. No

such question was raised in the court below, and, of course, it cannot be considered here.

Appellee also says that appellant is estopped from maintaining suit by his conduct after appellees had obtained their

4. EXECUTION judgment and a sale had been made thereunder. Plaintiff did nothing more than to attempt a redemption, and it is not shown that
SALE: action to cancel; estoppel.

the defendants herein were in any way prejudiced by his action. Appellees' motion to strike appellant's amendment to abstract is overruled. For the reason indicated, the judgment is *Reversed*.

ALONZO P. TUKEY v. JOHN W. FOSTER, IRA KNAPP, O. D. BENNETT, ALFRED PETERSON and W. A. SMITH, Appellants.

Mortgage foreclosure: APPEAL: JURISDICTION. Where simply a judgment *in rem* was entered in a suit to foreclose a mortgage, the mortgagor being served outside the state, jurisdiction on appeal could not be conferred over a purchaser of part of the mortgaged premises, where such purchaser did not appeal, by an attempted appearance of counsel in his behalf.

Same: NOTICE OF APPEAL: PARTIES. Co-parties whose interests may be prejudicially affected by a modification or change of the judgment must be served with notice of the appeal; and the fact that notice of the action was served outside the state will not obviate the necessity of serving notice of appeal.

Same. Where the reversal on appeal of a decree foreclosing a mortgage on a judgment *in rem* would continue the obligation without affording any relief by way of subrogation, the mortgagor and purchasers of the mortgaged property were co-parties whose interests would be affected by the reversal, and should be served with notice of the appeal.

Same: CONVEYANCES: COVENANTS: LIABILITY OF GRANTOR. Where the purchaser of mortgaged premises conveyed a portion by warranty deed, he was liable on his covenant to his grantee for the amount required to redeem the land from mortgage foreclosure.

Appeal from Harrison District Court.—HON. W. R. GREEN,
Judge.

WEDNESDAY, DECEMBER 11, 1912.

ACTION to foreclose a mortgage and to redeem from those claiming title under the foreclosure of a prior mortgage resulted in a decree as prayed. Several of the defendants appeal.—*Affirmed*:

L. W. Fallon for appellants *Reinholdt, Knapp, and Bennett*.

C. W. Kellogg, for appellant Peterson.

J. S. Dewell for appellant Smith, Intervenor.

Roadifer & Arthur, for appellee.

LADD, J.—The mortgage sued on was executed by John W. Foster to the plaintiff February 25, 1888, both then being residents of Nebraska, to secure the payment of a promissory note of even date, due five years thereafter. This mortgage was by its terms and in fact subject to a mortgage covering the same land, executed by Foster to Richman & Son, and by that firm assigned to John Prail, bearing date December 17, 1887, which was subsequently foreclosed without making plaintiff a party to the proceedings, and sheriff's deed issued, in pursuance of the decree and sale, to Prail, October 30, 1890. The latter conveyed the land to W. A. Smith under whom, through *mesne* conveyances, defendants Peterson, Bennett, Knapp, and Reinholdt owned separate parcels of the land at the time this action to foreclose the mortgage from Foster to plaintiff was commenced. Peterson, in a cross-petition, prayed that he might be al-

1. MORTGAGE
FORECLOSURE:
appeal: juris-
diction.

lowed to recover from Smith on his warranty deed whatever amount he (Peterson) might have to pay in order to redeem his forty acres from plaintiff's mortgage or decree foreclosing same. Decree of foreclosure was entered as prayed, and order entered that the purchaser at the sale might redeem from the sale under the former mortgage foreclosure by paying \$3,000, with interest, and also allowed Peterson to recover from Smith, as prayed. Foster accepted service of the original notice in Oklahoma, so that judgment *in rem* only was entered. Neither he nor Reinholdt appealed, and the attempted appearance of the latter by counsel did not confer jurisdiction on this court. *Ash v. Ash*, 90 Iowa, 229.

Nor was any notice of the appeals of Bennett, Knapp, Peterson or Smith served on either Foster or Reinholdt.

2. **SAME:** notice of appeal: parties. Because of the omission to make these defendants parties to the appeal, appellee has moved that the several appeals be dismissed. Co-parties, whose interests will be prejudicially affected by any change in the judgment or decree of the district court, must be served with notice of appeal. Section 4111, Code; *Oliver v. Perry*, 131 Iowa, 655; *Sullivan v. Sullivan*, 139 Iowa, 679. That Foster was served outside the state did not obviate the necessity of serving a notice of appeal on him. *Dillavou v. Dillavou*, 130 Iowa, 405.

3. **SAME.** Would a reversal of the decree be prejudicial to him or Reinholdt? The effect of the foreclosure of the mortgage will be the satisfaction of the indebtedness of Foster from the property hypothecated as security to plaintiff; whereas, if such foreclosure is denied, the promissory note will continue an obligation. This seems to be conceded by counsel for appellants; but they say that, even if the indebtedness were to be collected by foreclosure, the defendants could be subrogated to the claim of plaintiff against Foster on the note secured. All they acquired through *mesne* conveyances under the sheriff's deed by vir-

tue of the sale under the decree foreclosing the first mortgage was the title of the mortgagor and the interest of the mortgagee, subject to the lien, if any, of the second mortgage; and this being so, the enforcement of that lien was merely exhausting security given by the mortgagor, subject to which defendants had acquired the land. Manifestly no equities could arise in these circumstances calling for the application of the doctrine of subrogation. There is no escape from the conclusion that a reversal might prove prejudicial to Foster. Equally conclusive is the record as to Reinholdt. Neither appealing, nor having been made a party to the appeal, the decree as to his land would be unaffected by a reversal as to the tracts acquired by Peterson, Knapp, and Bennett; and for this reason the entire judgment in that event, instead of his equitable portion, would be saddled on his land. Clearly enough, then, he would be prejudicially affected by a reversal of the decree as sought; and, in the absence of service of the notice of appeal on him and Foster, the decree cannot be reviewed. Counsel suggest that, even if this is so, it is of no concern of appellee. But it is of concern to this court; for it is without jurisdiction to pass on issues the decision of which will prejudicially affect the interest of coparties not served with notice of appeal. *Clayton v. Sievertsen*, 115 Iowa, 687.

What has been said disposes of Smith's appeal, also, in so far as it involves the decree of foreclosure. But he also challenges the correctness of that portion of the decree allowing Peterson to recover of him whatever he may be required to pay, in order to effect redemption of the parcel of land acquired through *mesne* conveyances. As no one else is interested in this, it is subject to review; but the only doubtful question argued was settled in *Fashay v. Shafer*, 116 Iowa, 302, and *McClure v. Dee*, 115 Iowa, 546. See, also, *Boice v. Coffeen*, 158 Iowa, 705.

4. SAME: conveyances: covenants: liability of grantor.

It follows that the appeals must be and are dismissed,

save in so far as that of Smith involves the issues on the cross-petition of Peterson, and with respect to these the decree is *Affirmed*.

BOERNER FRY Co., Appellee, v. I. MUCCI, Appellant.

Sales: ACTION FOR THE PRICE: ISSUES: INSTRUCTIONS. In an action
1 for goods sold and delivered, in which the buyer claimed they were bought by sample and that they were not of the same quality, submission of the case on that theory was sufficient, over the objection that the instructions ignored the charge of false representations and worthlessness of the goods; since if they were not according to sample it was immaterial whether defendant charged false representations in that respect, or breach of warranty.

Instructions. Where the court submits a cause on the theory of a
2 party as disclosed by his testimony, though the evidence may not be consistent with his pleadings, he has no ground for complaint.

Same: REFUSAL OF REQUESTS. The refusal of requested instructions
3 fairly covered by those given by the court is not erroneous.

Same: FAILURE TO SEPARATE ISSUES. Where the buyer of goods, in
4 defense to an action for the price, pleaded that they were bought by sample with which they did not comply, and also filed a counterclaim based upon the same breach of contract, he can not complain that the court in its instructions failed to separate the affirmative defense and the counterclaim.

Evidence: EXPERIMENTS: DISCRETION. The question of making ex-
5 periments in the presence of the jury is peculiarly within the discretion of the trial judge. In the instant case the court did not abuse its discretion in refusing the proffered testimony.

Sales: EVIDENCE. Where the buyer in an action for the price of goods
6 pleaded the worthlessness of the same, it was within the discretion of the court to permit the seller to show in a general way the extent of his sales of the article.

Appeal from Pottawattamie District Court—HON. O. D. WHEELER, Judge.

THURSDAY, DECEMBER 12, 1912.

THE Plaintiff is a manufacturer of vanilla extract, residing at Iowa City. The defendant is a manufacturer and wholesale dealer in ice cream, residing at Council Bluffs. In October, 1909, the defendant gave a written order to plaintiff for the purchase of 52 gallons of special vanilla extract at \$3.50 per gallon, payable June 1, 1910. The order purported to be signed by the defendant and by W. C. Burge, a traveling salesman of the plaintiff. The goods having been delivered, the plaintiff brought this action upon the order. The defendant admitted the execution of the order, but averred affirmatively that the sale was made by sample, and that the goods were not according to sample, and that the defendant had therefore rejected the same and rescinded the contract, and so notified the plaintiff. Defendant also pleaded a counterclaim. Upon a trial to a jury, the plaintiff obtained a verdict for the full amount of its claim. Defendant appeals.—*Affirmed.*

Flickinger Bros., for appellant.

W. H. Killpack, for appellee.

EVANS, J.—The alleged errors complained of by appellant are such that it becomes necessary that we set out his answer and counterclaim, upon which the case was tried. We quote the same, as follows, from his additional abstract filed here:

April 14, 1911, defendant filed:

Amended and Substituted Answer.

Denying that plaintiff is a corporation; admits that on or about ——— he gave an order, in writing, to one W. C. Burge, plaintiff's agent and traveling salesman, for barrel of special vanilla extract, in words and figures and at the price set out in plaintiff's petition, and that the same was delivered to him. Further answering, defendant says that said barrel of extract was sold by sample, plaintiff furnishing a sample gallon can of the extract, and covenanting

through their salesman, W. C. Burge, orally that the barrel of extract to be furnished under said order to be of the same kind and quality as the sample furnished, when in truth and in fact the sample by which the sale of the barrel was made to him was entirely and radically different from the extract sold him in the barrel, that in the sample being the kind defendant purchased, and that in the barrel was a cheaper and different grade of goods entirely, and unfit for the use defendant purchased the same, namely, flavoring of his ice cream product. That plaintiff's agent, Burge, represented to your defendant orally that the goods sold by him were the same kind of goods as the sample furnished, when in truth and in fact the said barrel of extract was radically different, unlike the sample furnished, and was wholly unfit for the purpose for which it was purchased. That said representations were false and known by said salesman to be false, and defendant relied on said representations in making his order.

Counterclaim.

That defendant made use of a small part of this extract furnished in the barrel in the flavoring of his ice cream product, and the same resulted in his customers refusing the same and in shipping the same back. The extract gave the ice cream a flavoring of fancy soap. [Here follows a list of customers who returned the ice cream flavored with the extract from the barrel.] Which parties were old-time customers, and that defendant is damaged in his reputation in the manufacture of ice cream and his business, by reason of the use of said extract, in the sum of \$500. Defendant further states that he advised plaintiff of the fact that the barrel of extract could not be used, and that the same was subject to plaintiff's order, and that the same is now still held subject to his order, which notice was given as soon as he discovered the condition of said extract.

I. The trial court submitted the case to the jury upon the theory that the defendant pleaded a sale by sample, and that the goods furnished were not equal to the sample. Appellant complains of the instructions as a whole in this respect and urges that they "misstate the pleadings and misstate the evidence," and

1. SALES : action
for the price :
issues : instruc-
tions.

that they lose sight of the charge of false representation and of worthlessness of the goods shipped. A perusal of the defendant's pleading, which we have above set forth, is sufficient answer to this complaint. The only false representation charged in such pleading is that the goods were not according to sample. If they were not equal to sample, it was quite immaterial whether the defendant should have charged "false representation" or breach of warranty for a failure to comply with the sample. He did plead that because of such failure he rescinded the contract and tendered back the goods. The trial court submitted the case upon this theory. There was no other theory presented by defendant's pleading.

II. The trial court instructed the jury that the burden was upon the defendants to prove the following propositions:

First. That it was agreed between Burge, the plaintiff's agent, at the time of the sale, and the defendant, Mucci, that the barrel of extract in question would be of the same kind and quality as that contained in a sample *to be furnished* by the plaintiff company. Second. That a sample in accordance with such agreement, was furnished to defendant by the plaintiff company. Third. That the barrel of extract in question did not correspond with such sample so furnished in kind and quality, but was inferior thereto. Fourth. That the defendant, within a reasonable time, after said barrel was delivered to him, elected to rescind said contract and to return said goods, and notified the plaintiff company of his election so to do.

The appellant complains because this instruction assumes that the sample referred to was "*to be furnished*" subsequent to the date of the contract. The same

2. INSTRUCTIONS.

assumption appears in other instructions of the court. The order sued on in this case was dated October 25, 1909. It provided for delivery April 1, 1910, and payment sixty days thereafter. Turning to defendant's answer, its natural construction would be that a sample was pre-

sented at the time of the sale. Appellant's counsel contends strenuously for this construction. Plaintiff's witness Burge testified that he had a sample vial of the extract at the time the order was taken. But this statement was vigorously denied by the defendant, Mucci, in his testimony, notwithstanding the form of his answer. Defendant also testified that a sample gallon was "to be sent" to him forthwith before the filling of the principal order, and that such sample gallon was sent to him later in November, and that he thereafter directed the shipment of the principal order.

We quote from his testimony, as it appears in his own abstract, as follows: "I ordered a barrel of vanilla extract along about December, 1909, through a Mr. Burge, who is here in the courtroom. He came to my place in Council Bluffs along in the fall and wanted to sell me a barrel. I told him to send a sample of the barrel, which he did later in the fall, about a month or six weeks before I made the order. I examined this sample. *It was vanilla extract, made of beans, good vanilla, and we used it.* Later, afterwards he came along, and I ordered from him a barrel, which was to be the same thing as the sample he had already sent. Burge told me that *the vanilla would be a vanilla bean extract, either 'Vergonis' or 'Mexican,' and it would be just as good as the sample he had sold me.* The barrel was to be the same as the sample. I was paying less money for it than what I had bought before; *but it was to be like the sample—good vanilla flavoring, which he charged me \$5 for.* I got the sample some time in November—some time before I gave the order, maybe a month or four weeks—by express. Then Burge came back again and took my order for the barrel."

He also wrote the following letter to the plaintiff, which he introduced in evidence at the trial:

"Council Bluffs, Iowa, July 8, 1910.

"Boerner Fry Co., Iowa City, Iowa—Gentlemen: The vanilla we ordered from your agent was to be a *straight va-*

nilla extract. It is not like the sample sent me. Your agent gave us a guarantee, a pure vanilla, as good as the sample sent us."

The foregoing quotations render it very clear that the instructions of the trial court at the point complained of simply adopted the theory of the defendant in his testimony upon the trial. Even if such testimony was inconsistent with his pleadings, he is in no position to complain that the trial court submitted the case to the jury upon his own theory of the facts. It will be noted, also, that the allegations of the answer are not necessarily inconsistent with this theory.

III. The defendant presented to the trial court three requested instructions, which were marked "Refused," and these
 3. SAME: refusal of requests. are presented for our consideration. Although the particular instructions requested were marked "Refused," they were in fact incorporated, in their essential features, in the instructions given by the court upon its own motion. Appellant's argument contends for the propriety of the instructions; but he does not point out to us any essential part of any one of the same which is not fairly included in the instructions as given.

IV. Complaint is made that the trial court did not properly separate the allegations of the affirmative defense
 4. SAME: failure to separate issues. and those of the counterclaim, and that these were so mingled in the instructions, that the jury could not distinguish between them.

The instructions quite conformed to the defendant's pleading as he chose to make it. The affirmative defense went to plaintiff's whole case. If sustained, it would necessarily defeat any recovery on the part of plaintiff. In the absence of consequential damages, the defeat of the plaintiff's cause of action would measure the full amount of plaintiff's injury. But the counterclaim pleaded consequential damages, in that the attempted use of the defective material had destroyed other material of large value. But the counterclaim, never-

theless, necessarily rested upon the same breach of contract as the affirmative defence. The defendant prefers to call it "false representation," but this adds nothing to his case. It was sufficient for him to show that the goods did not correspond to sample, and that he rescinded because thereof. If it were essential to his defense that he show false representations in a legal sense, then his case would fail for want of proof of *scienter*.

It is urged in argument that the counterclaim rested upon different allegations of falsity from those of the affirmative defense. We are unable to find any allegations in the counterclaim to warrant this contention; nor are we ready to concede that it could rest upon any different allegations, except as to the extent of damages claimed. The damages set forth in the counterclaim are claimed to be consequential to the breach pleaded in the affirmative defense.

V. Complaint is made of rulings in the admission of evidence. The witness Day, one of the employees of the defendant, testified on behalf of defendant as follows: "We mixed up a batch of cream, ten gallons, with four ounces of vanilla."

5. EVIDENCE:
experiments:
discretion.

Bucket of ice cream produced, marked 'Exhibit 13.' 'The vanilla extract was taken out of this barrel, marked "Boerner Fry Co.," and is in that ice cream. *It has a taste of vanilline or vanilla extract. Vanilline is used in imitation flavoring.*' At this time defendant asks that the jury be permitted to taste the ice cream in the jar, 'Exhibit 13.' Objected to as incompetent and immaterial and irrelevant. Court: 'I do not believe, gentlemen, I will permit the jury to indulge in this luxury at the present time.' Defendant excepts."

We have frequently held that the question of making experiments in the presence of the jury is one peculiarly within the discretion of the trial court. *Chicago Supply Co. v. Marne Telephone Co.*, 134 Iowa, 252. Several good reasons occur to us why the trial court might properly refuse

the proffered testimony. The preliminary showing was deficient. The professed purpose of the experiment was to show that the extract in question would produce a "soapy taste" in the ice cream. It is quite manifest that, though the extract had been perfect, the ice cream might nevertheless disclose the "soapy taste." The court would then have to try the question as to what other ingredients were contained in the ice cream, and as to whether any of them, other than vanilla extract, were calculated to produce a "soapy taste." If the "soapy taste" was to be traced to the extract, the extract itself would have been a sufficient offer. The trial court was clearly within its discretion in the ruling complained of.

The trial court also permitted the plaintiff to show, in a general way, the extent of its sales to customers of the kind

e. SALES: evidence.

of vanilla extract involved in the controversy.

Complaint is made of this line of testimony.

It was quite beside the real issues. Its only justification was that the defendant had redundantly pleaded the worthlessness of the article, and had introduced some evidence along the same line. The trial court was within the proper exercise of its discretion in permitting the plaintiff to meet such evidence within reasonable limits. We think appellant has no ground for complaint here.

The foregoing covers the principal points argued. The record is badly chopped up with five abstracts and four arguments, and this has materially increased our labors in disposing of the case.

We find no reversible error in the record, and the judgment below is accordingly *Affirmed*.

GEORGE COLLINS, Appellant, v. BOARD OF SUPERVISORS OF
POTTAWATTAMIE COUNTY, et al., Appellees.

Drainage: NOTICE: NAMES OF PARTIES: SUFFICIENCY. The middle
1 initial or name of a person is no part of the name in the sense

that it must be used in a notice to land owners in drainage proceedings.

Same: CLAIMS FOR DAMAGES: DISMISSAL. Where a party had sufficient notice of the establishment of a drainage district and did not file his claim for damages within the statutory time, both the supervisors and the court on appeal were justified in disallowing it; and as the statute plainly provides the penalty for such failure, without making any exceptions, the supreme court is not authorized to consider any equitable excuses.

Same: APPEAL: DISMISSAL. An appeal bond in drainage proceedings which has no other sureties than one of appellant's attorneys is not sufficient, and authorizes a dismissal of the appeal.

Same: ASSESSMENTS: VOLUNTARY PAYMENT. Voluntary payment of an assessment for drainage purposes after an appeal from the assessment, though made under protest, will not excuse the party from the consequences of his act, and an order confirming the assessment will be approved.

Same: ASSESSMENT: PRESUMPTION: BURDEN OF PROOF. An assessment in drainage proceedings will be presumed to be equitable and just, and a party objecting thereto has the burden of showing that it was inequitable; and it is not enough to overcome the presumption to simply show that it exceeds the benefits to his particular land, as the assessments of other like lands in the district must be considered in determining the question of inequality.

Same: ASSESSMENT: REVIEW: MANDAMUS: EQUITABLE RELIEF. Where the board of supervisors properly rejected a claim for damages in drainage proceedings their action will not be reviewed in mandamus proceedings: Nor will a court of equity relieve a landowner from the consequences of his delay in filing his claim with the board by making the assessment itself.

Appeal from Pottawattamie District Court.—HON. O. D. WHEELER, Judge.

THURSDAY, DECEMBER 12, 1912.

PLAINTIFF'S lands were included in a drainage district established by defendant county, and he filed a claim for damages which was disallowed. Subsequently his lands were

assessed for benefits to the extent of \$800 or \$900, and he appealed to the district court from such assessment. Thereafter he filed a petition in mandamus to compel the board to pass upon his claim for damages, for an injunction, etc. These different proceedings were all consolidated, and tried in the district court, resulting in an order and judgment sustaining the board of supervisors in disallowing the claim for damages, confirming the assessment of his lands, and dismissing the petition for mandamus. Plaintiff appeals.—*Affirmed.*

Flickinger Bros., for appellant.

W. H. Kilpack, for appellees.

DEEMER, J.—In the year 1909 a proceeding to establish a drainage district known as the “Pigeon creek extension ditch” was pending before the defendant board of supervisors. The proposed district embraced the eighty acres of land in controversy, which was then owned by Emma Jones, whose maiden name was Emma Forsythe, and her husband was one of the petitioners for the district. During the pendency of the proceedings, which were regular in every respect, Emma Jones and her husband contracted to sell the land to one Rhodes. This contract was not recorded. By the terms thereof possession was to be given March 1, 1910. Plaintiff purchased the land by taking an assignment from Rhodes, but did not go into possession of the land until March 1, 1910. He obtained his deed, however, on February 7th, and recorded it February 9th. Before getting the deed, and on January 22, 1910, he filed with the board of supervisors his claim for damages to the land by reason of the establishment of the district. This claim was disallowed by the board, and plaintiff appealed to the district court. The lands were then assessed for benefits, and plaintiff appealed to the district court, but did not file his petition in that court

within the time required by statute. An excuse is offered for not filing it in time, which will be referred to later. The appeal bonds in the two cases mentioned were signed by appellant's counsel as sureties. It appears that, when the case assessing lands for damages reached the district court, a demurrer was filed to the petition on the ground that the plaintiff was not entitled to file a claim for damages, and that in any event the claim was filed too late. This demurrer was sustained, and plaintiff thereupon amended by pleading that his claim was filed five days before the day set by the board for the hearing. The defendants also moved to dismiss both appeals because the appeal bonds were signed by appellant's counsel as sureties, and for the reason that plaintiff's petition in the appeal from the assessment was not filed in time. Defendant also denied that the claim for damages was filed in time for a hearing before the board, and also denied that plaintiff was entitled to file any claim for damages for the reason that he was not the owner of the land. The petition for mandamus and injunction concluded with this prayer: "Wherefore, by reason of the premises, your petitioner prays the order and direction of this court enjoining the defendant C. H. Sternberg & Sons from entering upon or trespassing upon plaintiff's lands. That the proceedings establishing said ditch across his land be declared null and void and without force and effect, and that said board of supervisors be enjoined from further proceeding with the construction of said ditch or its establishment across your petitioner's land, and, in default of an injunction restraining them, they be commanded and directed forthwith to hear and determine the amount of damages to which plaintiff is entitled by reason of the location of said ditch across his said premises, and your petitioner prays for such other and further relief as may be just and equitable in the premises." The answer to that petition was that plaintiff had not filed his claim for damages in time, that contracts for the construction of the ditch had been let to Sternberg & Sons, and that in any event plain-

tiff's remedy was at law by appeal. Some of these motions were not ruled upon at any time except as may be inferred from the final order of the court. The statute with reference to the filing of claims for damages provides that they must be filed in the office of the county auditor at least five days prior to the day set for hearing and also provides: "Failure to file such claim at the time specified shall be held to have waived his rights thereto." Code Supp. section 1989-a4, as amended by 34 G. A. chapter 88.

I. The notice given in this case pursuant to Acts 33d G. A. chapter 118, was directed to a long list of owners, including the name Emma Forsythe Jones, and the time for hearing was fixed as January 24, 1910. Plaintiff did not file his claim until January 22d of that year, and, of course, it was not in time.

But it is contended for him that notice was insufficient because addressed to "Emma Forsythe Jones," instead of "Emma Jones." The law with reference to this matter is as follows:

When the plan, if any, shall have been finally adopted by the board of supervisors, they shall order the auditor immediately thereafter to cause notice to be given to the owner of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office, including railway companies having rights of way in the proposed district, and to each lienholder or encumbrancer of any land through which or abutting upon which the proposed improvement extends as shown by the county records, and also to all other persons whom it may concern, including actual occupants of the land in the proposed district (without naming individuals), of the pendency and prayer of said petition, the favorable report thereon by the engineer and that such report may be amended before final action, the day set for hearing on said petition and report before the board of supervisors, and that all claims for damages must be filed in the auditor's office not less than five days before the day set for hearing upon the petition, which notice shall be served by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the

county, the last of which publications shall be not less than twenty days prior to the day set for hearing upon the petition, proof of such service to be made by affidavit of the publisher and filed with the county auditor. (Acts 33d G. A. chapter 118.)

The record shows the following with reference to whom the notice in this case was addressed: "Publication in usual form, giving notice to a long list of owners' names, among others 'Emma Forsythe Jones.' . . . Notice published in Council Bluffs Daily Nonpareil December 23rd and 30th, 1909." The transfer books are reproduced, and they show that "Emma Jones" or "Emma Forsythe," who it is conceded is the same person as Emma Jones, was the owner of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 12, part of the land in controversy, and of an undivided interest in the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the same section. If there be any other party interested in this last described forty as shown by the transfer books it is Susan Forsythe. However, plaintiff's claim in this respect is that a notice addressed to "Emma Forsythe Jones" is not a notice to "Emma Jones." It is hornbook law that the middle member of one's name is no part of the same, and the notice, in so far as complaint is made of it, was sufficient. *Hendershoot v. Thompson*, 1 Morris, 186; *Loser v. Plainfield Savings Bank*, 119 Iowa, 672; *Grimes v. Martin*, 10 Iowa, 347. As plaintiff derived his title and rights through Emma Jones, he cannot complain that notice was not given Susan Forsythe, even if he had made that point.

The notice was sufficient in so far as plaintiff is concerned, and, as he did not file his claim with the board in time, both the board of supervisors and the district court were justified in denying it. *Johnson v. Board*, 148 Iowa, 539. The statute plainly provides the penalty for such failure and contains no exceptions. We are not justified, therefore, in considering any equitable excuses, even if they had been shown.

1. DRAINAGE :
notice : names
of parties :
sufficiency.

2. SAME : claims
for damages :
dismissal.

Moreover, the bonds for appeal had no other surety than one of appellant's attorneys. Under previous holdings this

3. **SAME: appeal: dismissal.** was ground for dismissing the case in the district court. *Minton v. Ozias*, 115 Iowa, 148; *Hudson v. Smith*, 111 Iowa, 411; *Bank v. Garretson*, 104 Iowa, 655.

II. As to the appeal from the assessment of benefits, there are several reasons why the order should be affirmed. The first is that since the appeal plaintiff has voluntarily paid the amount of his assessment. True, he did this as he says under protest, but this is not sufficient to relieve him from the consequences of his payment. *Dittoe v. Davenport*, 74 Iowa, 66. Moreover, the appeal bond given on this appeal was signed by one of plaintiff's counsel as surety, and under previous holdings this was insufficient. We shall treat the excuse for delay in filing the petition on this appeal as sufficient, as doubtless did the district court, and, conceding *arguendo* that plaintiff is entitled to a hearing on the merits of this appeal, we find no reason for disturbing the order of the district court affirming and confirming the assessment.

The assessment is presumed to be correct and equitable, and the burden is on the plaintiff of showing that it was made on an incorrect basis, or is inequitable. It is not enough for him to show or try to show it was in excess of the actual benefits to his land. Other assessments on lands of like character in the district must be considered and irregularities or inequalities therein shown. This was not done here, and no reason appears for interfering with the assessment made against plaintiff's land.

III. The independent suit in equity cannot be maintained. The board of supervisors did act on plaintiff's claim, and rejected it. Plaintiff cannot have the correctness of that decision reversed by mandamus.

Nor can he by action in equity have his damages assessed.

6. **SAME: assessment: review: mandamus: equitable relief.**

A court of equity will not relieve him from the consequences of delay in filing his claim with the board and undertake itself to act as an assessing tribunal. The statute, as we think, forbids any such proceeding. Even if it were permissible, no such showing was here made as to justify equitable interference. There is some testimony to the effect that failure to file the claim was due to the negligence of plaintiff or his attorneys. But, however this may be, it would be unwise to establish a rule which would permit parties in drainage proceedings to go into a court of equity for relief based upon equitable circumstances. If such proceedings were tolerated, drainage proceedings would be unduly delayed, and the board of supervisors could not act with any assurance as to the final cost of the improvement. Surely a court of equity should not be made an independent assessing tribunal. For reasons already indicated, the board of supervisors was justified in disallowing plaintiff's claim for damages; and, this being true, plaintiff has no cause of action in equity upon any theory. Even if equitable circumstances might be considered they should be heard in the proceedings before the board and not introduced into the case by an independent action in equity.

No reason appears for disturbing the orders and judgments appealed from, and they are each and all *Affirmed*.

MARTHA M. BARTHELL, et al., Appellants, v. L. T. HERMANSON, Treasurer, et al., Appellees.

Taxation: OMITTED PROPERTY: SETTLEMENT: REPUDIATION BY COUNTY.

- 1 Tax ferrets have authority to settle with a taxpayer for the amount he should have paid on omitted property, and in doing so could take into consideration the amount he had been regularly assessed, although not authorized to deal with taxes regularly assessed and unquestioned; and the county cannot repudiate a settlement thus made without tendering back the amount received under the settlement.

Same: TREASURER'S RECEIPT: PAROL EVIDENCE. A treasurer's receipt
2 for the payment of taxes is not conclusive on the subject, but is
subject to explanation by parol.

Same: DECREE OF COURT: AMBIGUITY: EXPLANATION. An ambiguity
3 in a court decree may be explained by parol evidence.

Same: PREVIOUS SETTLEMENT OF TAXES: EVIDENCE. In this action to
4 enjoin the sale of land for taxes of a certain year, the evidence is
held to show that a settlement of taxes on omitted property in-
cluded taxes previously assessed, as shown by a decree entered upon
a stipulation of the parties.

Same: MUTUAL MISTAKE: ESTOPPEL. Where a county retained the
5 money paid as taxes under a settlement between tax ferrets and
the taxpayers it was bound by the settlement, although the same
was paid under a mutual mistake.

*Appeal from Allamakee District Court.—HON. A. N. HOB-
SON, Judge.*

FRIDAY, DECEMBER 13, 1912.

ACTION to enjoin the sale of certain lands for the taxes
of the year 1908, and to cancel the assessment against it
for that year. The trial court dismissed the petition and
plaintiffs appeal.—*Reversed and remanded.*

*William S. Hart, D. J. Murphy, and Stilwell & Stil-
well, for appellants.*

H. E. Taylor and Frank Sayre, for appellees.

DEEMER, J.—The decision here turns upon the effect of
a decree of the district court of Allamakee county on the
31st day of August, 1908, entered pursuant to a stipulation
of the parties in certain cases then pending in said court.
The stipulation which is the foundation of the decree reads
as follows:

August Term, 1908—Stipulation. In the District Court
of Iowa in and for Allamakee County. In the appeal of

Martha M. Barthell, M. J. Barthell, B. F. Barthell, and Myrtle L. Barthell, Appellants, from the assessment made by J. M. Leppert, Treasurer of Allamakee County, and Chas. H. Barthell, Geo. P. Barthell, J. W. Barthell, Sarah J. Faegre, J. S. Barthell, Minnie Meier, Anna Steinbach, other parties thereto. It is hereby stipulated by and between the board of supervisors, the county of Allamakee, Iowa, and the treasurer thereof, on the one part, and Martha M. Barthell, Sarah J. Faegre, J. W. Barthell, Chas. H. Barthell, George P. Barthell, Anna Steinbach, Minnie Meier, M. J. Barthell, J. S. Barthell, B. F. Barthell, and M. L. Barthell, on the other part: That whereas, the treasurer, his assistants and others, have listed for taxation, or assessed and taxed, a large amount of moneys, bonds, stocks, loans and credits for the years 1903, 1904, 1905, 1906, 1907 and 1908 against the above-named parties of the second part: Now therefore, in order to avoid a vast amount of litigation and adjust all tax matters for said years of 1903, 1904, 1905, 1906, 1907 and 1908, that may have been made or shall be made for such years of 1903, 1904, 1905, 1906, 1907 and 1908 against any, each and all of said parties, including any such tax or assessment that might have been assessed against the estate of J. M. Barthell, deceased, now settled, it is hereby stipulated: That an order shall be made by the district court of Iowa, in and for Allamakee county, at the August term, 1908, thereof that the suits of the above-named appellants shall be consolidated and all of the other heirs of the said J. M. Barthell, deceased, be made parties to said suit, and that said court at said term shall make the following order herein: The listing for assessment and the assessments made by the treasurer or others against any of the above-named parties be and the same are hereby canceled and rebated and that instead of said assessments there be assessed a gross sum against all of said parties aggregating the sum of \$1,800, which shall be in full of all taxes assessed or to be assessed against them or either of them for the years, 1903, 1904, 1905, 1906, 1907 and 1908. Peisen Welch Co., by J. W. Peisen. D. J. Murphy, Stilwell & Stilwell, attorneys for appellants.

And the decree entered therein is in these words:

And now, to wit, on the 31st day of August, the same being the 1st day of the regular August term, 1908, the court,

after being duly advised in the above matter, ordered, adjudged, and decreed that the causes Nos. 7,800, 7,801, 7,802, and 7,803 be and the same are hereby consolidated as per above stipulation, and on the payment of the sum of \$1,800, and all costs, to be in full settlement of said causes against all parties as stipulated above, and that all taxes and assessments as per said stipulation be and the same are hereby canceled and receipted in full. Said sum and all costs have been paid in full and said amount of \$1,800 paid by the clerk of this court to J. M. Leppert, treasurer, and all costs paid, and taxes canceled as per stipulation.

On the same day the money was paid to the clerk, and he issued the following receipt:

Duplicate.

Waukon, Iowa, Aug. 31st, 1908.

Office of Clerk of District Court of Iowa, in and for Allamakee County. Received of Martha M. Barthell, M. J. Barthell, B. F. Barthell, Myrtle L. Barthell, Chas. H. Barthell, Geo. P. Barthell, J. W. Barthell, J. S. Barthell, Sarah J. Faegre, Minnie Meier, Anna Steinbach, in the case of said parties v. J. M. Leppert, Treasurer of Allamakee, case No. 7,800, the sum of eighteen hundred dollars (\$1,800) in full payment of all taxes and assessments made or that may be made against each or any of said parties for the years 1903, 1904, 1905, 1906, 1907 and 1908, inclusive, as per order of court this day made in said case. James Collins, Clerk of the District Court of Iowa, in and for Allamakee County.

And on the same day the county treasurer receipted for the amount by the following receipt:

Received above amount in full payment of taxes as above stated, this 31st day of August, 1908.

J. M. Leppert, Co. Treasurer.

Receipt No. 173.

It is claimed on the one hand, and denied on the other, that the following appeared on the receipt given by the clerk:

Waukon, Iowa, August 31, 1908.

M. J. Barthell. Allamakee County Taxes on Omitted Property. Taxing District, Waukon.

Year.	Amount Taxable Omitted.	Rate. Value.	Tax.	Int.	Total.
1903					
1904	To cover years 1903 to 1908, inclusive,				
1905	as against all parties named in stip-				
1906	ulation				
1907					
1908	Grand Total				
No. 173.					

Upon this record plaintiffs claim that all their taxes for the year 1908, which were levied against them, have been fully paid and satisfied and should be canceled, and that the county treasurer should be enjoined from collecting the same by a sale of plaintiffs' real estate. So far there is no dispute in the record save over the nature of the receipt given by the county clerk; but appellees contend that the documents, receipts, decree, etc., above referred to had reference only to property omitted by the plaintiffs from taxation, and that the only taxes for the year 1908 which were referred to or were in controversy were those which were or might have been claimed to have been omitted from the assessment made against the plaintiffs, and they introduced testimony to show the nature of the previous controversies, and the intent of the parties in making the settlement and in consenting to the decree. In response to this, plaintiffs say the record is a verity, and that it cannot be contradicted or explained by parol testimony, and further that, conceding the admissibility of such testimony, plaintiffs have shown that the stipulation and decree were intended to cover all their taxes for the year 1908.

Defendants also claim that, even if the settlement did cover all the taxes assessed against plaintiffs for the year

1908, it should not be considered nor the decree given force

1. **TAXATION:** for the reason that the tax ferrets who made
 omitted prop- the stipulation and consented to the decree
 erty: settle-
 ment: repudia- had no authority either in law or fact to
 tion by
 county. do so. We may as well dispose of this prop-

osition of law here before going to the other matters in dispute. Assuming that the tax ferrets had no authority to deal with taxes regularly assessed and which were not the subject of controversy, they undoubtedly had authority to settle with plaintiffs for the amount they should pay on property omitted from taxation, and, if in so doing they took into account in making the settlement the amount of taxes already assessed, there is no reason why the county should be permitted to repudiate the settlement

Moreover, if, as plaintiffs claim, they made the settlement on the basis of the inclusion of all of their taxes for the year 1908, neither the county nor any of its representatives can repudiate that settlement, even if made without authority, unless it tenders back to plaintiffs the amount received from them in virtue of the settlement. Neither the county nor its officials can have the benefits of the agreement without assuming its burdens, and by retaining the money it becomes bound to perform the agreement, whatever it may have been. These propositions are very fundamental in actions between private persons, and a county and its officials are not exempt from such wholesome rules.

Appellants' main insistence is that as the decree and stipulation covers all taxes assessed, or to be assessed, against the parties named for the year 1903, 1904, 1905, 1906, 1907, and 1908, this is the end of the controversy.

2. **SAME: treas-** They also rely upon the terms of the receipt
 urer's receipt:
 parol evidence. given by the clerk; but, as that is a mere receipt and capable of explanation, it is not conclusive, but may be considered as an evidentiary fact in construing the decree itself.

Defendants say that the decree is not conclusive, but is

subject to explanation, and that it has no reference whatever to any taxes except on omitted property for any of the

3. SAME: decree of court: ambiguity: explanation. years named. That it had reference to no other taxes except omitted ones for all years prior to 1907 is very clear, for they were not in dispute, and, as the decree in virtue of this fact is ambiguous, we think parol testimony was admissible to explain just what taxes for the years in question were intended to be covered by the decree. Manifestly it was omitted taxes for the years 1903, 1904, 1905, 1906, and 1907.

4. SAME: previous settlement of taxes: evidence. Was it the same kind of taxes assessed or to be assessed for the year 1908? This, as it seems to us, is the pivotal question in the case. Upon this proposition, because of the denials, amendments to and counter denials of abstracts, we have been compelled to resort to the transcript; and from a reading thereof we extract the following: The Peisen Welch Company was employed some time in the year 1907 by Allamakee county for the purpose of collecting taxes on omitted property. Early in March of the year 1908 they reported to the treasurer assessments for the years 1903 to 1907 including a large amount of moneys and credits which had been omitted from taxation by M. J. Barthell, B. F. Barthell, Martha M. Barthell, and Myrtle L. Barthell, and the treasurer gave each of these parties notice that it was proposed to assess them on such omitted property. Each of them appeared and filed objection, and on April 1st M. J. Barthell was assessed with a total tax on such property amounting to \$9,651.51, B. F. Barthell to the amount of \$1,062.24, Martha M. Barthell to the amount of \$2,205.13, and Myrtle L. Barthell to the amount of \$708.18. Each appealed to the district court, and pending the appeal negotiations for a settlement were entered into between the appellants and all the other heirs of J. M. Barthell, deceased, and the "tax ferrets," culminating in the written agreement of settlement herein before set out. This contract was entered into on August 31, 1908, and the regu-

lar taxes for that year, while already assessed, were not due. Some of the regular 1907 taxes levied against the property of some of the parties to the settlement had not been paid; that is to say, some of them had not paid the second installment of the 1907 taxes. The taxes in controversy are the remainder of the taxes for the year 1907 and the whole of those for the year 1908, being, as we understand it, \$55.62, against Martha M. Barthell, against C. H. Barthell \$88.76, against G. P. Barthell \$52.45, against Anna Steinbach \$52.45, against M. J. Barthell \$75.63, and against the estate of J. M. Barthell, deceased, the sum of \$217.82; these taxes being upon real and personal property, including in some cases a small amount on moneys and credits.

It will be noticed from the contract that for some reason seven persons in addition to those who were parties to the appeal were brought into the settlement, and that taxes assessed or to be assessed for the year 1908, which were not included in the original appeals, were also expressly covered. Defendants contend that the additional parties were introduced because they were heirs of J. M. Barthell, deceased, from whom they inherited the moneys and credits which it is claimed had been omitted with the thought of closing up the entire matter of omitted taxes for the years in question, and they also say that the year 1908 was referred to in order to cover any future assessment on omitted property for that year. While, on the other hand, plaintiffs say that the negotiations for settlement at all times had reference not only to taxes on omitted property, but covered all taxes assessed or to be assessed against any or all of the parties named, for the years named in the agreement of settlement, and that, in all negotiations for the settlement, all taxes then due, or assessed, or to be assessed, were specifically mentioned, and the fact that some of the taxes were not then due was considered and taken into account. It is unfortunate that the agreement of settlement was so carelessly draughted as to be subject to two constructions. Standing alone and without

reference to any of the circumstances surrounding its making, it clearly covers all taxes for the years 1903, 1904, 1905, 1906, 1907, and 1908, and but for the fact that the original controversy was over omitted property and made by tax ferrets whose only employment was to collect such taxes, there would be no doubt in our opinion that it supports plaintiffs' contention. One of the tax ferrets testifies, however, that the agreement was made to cover omitted taxes for the years 1903 to 1907, inclusive, and any claim for taxes on such property which it might be claimed should be assessed for the year 1908. But this is expressly denied by at least three witnesses who testified that in all the negotiations all taxes for the years mentioned, including taxes on the real estate, were expressly mentioned and taken into account. It is manifest that in this settlement new parties were brought in for some purpose, and taxes included which down to that time had not been the subject of controversy. At that time no claim was being made against some of these new parties, but taxes had been assessed against them on other property, and it is also shown that nothing but regular taxes had ever been assessed or claimed against them. The preponderance of the testimony shows that mention was made of the fact that some of the taxes covered by the agreement were not yet due, and the record shows that Chas. Barthell stated to Mr. Peisen, who made the settlement, that he had no moneys and credits, that there was a regular tax against him on real and personal property at that time, that he would not settle unless these regular taxes were included, and that upon the settlement he paid \$100 of the \$1,800 agreed upon. A reading of the testimony satisfies us that the preponderance is with the plaintiffs, and that those of them having to do with the settlement—three in number—fully understood and believed that all their taxes for the years 1907 and 1908 were included in the settlement. As we view it, the wording of the agreement itself lends support to this contention.

At any rate, if they were mistaken in their belief, as

defendants contend, they (defendants) as representatives of the county cannot hold the money paid in because of the mistake and collect the taxes too. The most

5. SAME: mutual mistake: estoppel.

that can be claimed from the record is that a mutual mistake was made, not only in the negotiations but in drawing the stipulation as well; but that in our opinion is not sufficient to defeat the plaintiffs.

From this conclusion it follows that the decree must be, and it is, reversed, and the cause remanded for one in harmony with the opinion.—*Reversed and Remanded.*

THEODORE OLSON V. JOSEPH MICHENER, Appellant.

Partnership: EVIDENCE: ACCOUNTING. In this action for an accounting between partners, the evidence is reviewed and held to show that plaintiff had an interest in the profits on a sale of horses; and to support a finding that there was a partnership relation entitling him to an accounting.

Appeal from Pottawattamie District Court.—HON. W. R. GREEN, Judge.

FRIDAY, DECEMBER 13, 1912.

THE facts are stated in the opinion.—*Affirmed.*

Fremont Benjamin and Verne Benjamin, for appellant.

F. E. Gill and Geo. H. Mayne, for appellee.

SHERWIN, J.—This is an action in equity, brought by the plaintiff against the defendant for a partnership accounting. There was a judgment for the plaintiff, from which the defendant appeals.

At the time of the transaction in question John S. Cooper

was engaged in the horse commission business at South Omaha, Neb., and the appellant, Joseph Michener, was employed by Cooper as an auctioneer and solicitor of business. Appellant was also engaged in buying horses on his own account for sale through the Cooper commission house in South Omaha. The plaintiff lived in Sioux City, Iowa, and had been handling range horses for a number of years. In May, 1907, plaintiff and the defendant met in Sioux City, where they had a talk about the purchase and sale of Western horses, and according to the plaintiff's testimony, where they first talked about forming a partnership for the purpose of buying range horses and selling them through the Cooper sales. No definite final arrangement was made at that time, but defendant asked the plaintiff to go to South Omaha at a later time for the purpose of further considering the matter of a partnership, telling the plaintiff that he knew where they could buy horses that would make them money. On the 14th of May, the Plaintiff went to South Omaha, where he met the defendant, and they again talked of a partnership. The defendant then told the plaintiff that there were several bands of horses in the Laramie Plains district that could be bought, and particularly spoke of a band of about 3,000 horses called the Smith & Moore horses. This band of horses had been owned by a partnership composed of J. A. Smith and Alexander Moore. Alexander Moore had recently died, and the horses were to be sold by the surviving partner, J. A. Smith. There is evidence tending to show that in the conversation at this time the defendant showed the plaintiff letters that he had received from Sam Moore, who was a son and heir of the deceased, Alexander Moore, in reference to these horses. It was finally agreed between plaintiff and defendant that they would go together to Wyoming for the purpose of looking at these horses and buying them, if they could be bought right. Following out this arrangement, they went to Wheatland, Wyo., for the purpose of buying the Smith & Moore horses, arriving there on the 19th of May.

Sam Moore lived in Wheatland, and they at once arranged with him to go with them to the Smith & Moore ranch at Toltec to meet J. A. Smith, look at the horses, and see if they could buy them; Olson hiring a livery team for the trip and paying therefor. The ranch was some eighty miles from Wheatland, as we understand the record, and after these parties had got about half way there they learned that J. A. Smith had already sold the horses to one Gallup, of South Omaha, and they then immediately went back to Wheatland. Sam Moore, who, as one of the heirs of Alexander Moore, had an interest in the horses, was dissatisfied with the sale to Gallup, and there is evidence tending to show that he asked Michener and Olson if they would give more for the horses, and they told him they would pay \$40 a head for them, if that price was necessary to get them.

On the same day a contract was made by Michener & Olson, as a partnership, to buy horses owned by Sam Moore alone, and Olson testified that he told Michener that he would become a partner in the contract with Sam Moore, on condition that all horses that were bought in the Laramie Plains district were to be bought in partnership, and that such agreement was then definitely made. After the purchase of the Sam Moore horses, it was agreed that all three of them would go to Cheyenne and see Mr. J. A. Smith, and, if possible, get him to cancel the Gallup contract for the Smith & Moore horses. They went to Cheyenne, saw Mr. Smith, and Olson offered him \$40 a head for the horses, as he testifies, acting upon Michener's suggestion. Smith told him that the horses were sold; "that it was too bad, but he couldn't do anything for him." This offer was made on behalf of Michener & Olson. Sam Moore at that time told Smith that he was not satisfied with the sale that had been made to Gallup, and that he would not stand for a sale of the horses at \$35 a head, which was the price that Gallup was to pay. The principal bands of horses in the Laramie Plains district were the Smith & Moore horses, the Sam Moore horses, the

Frank Amos horses, the Bowles & Wright horses, and the Qualey horses; and after the meeting in Cheyenne, to which we have referred, Michener & Olson, as a partnership, entered into contracts for and bought the Amos, the Bowles & Wright, and the Qualey horses. The Sam Moore horses they had already bought, and Michener also subsequently bought other horses for the partnership. While Michener claims that their partnership relations ceased about the 15th of June, the defendant's subsequent acts, and a letter written by him to the plaintiff on the 17th of June, sustain the plaintiff's contention that the relationship still continued. We shall again refer to this letter later on.

Plaintiff and defendant met in South Omaha on the 15th of June, and under an agreement then made Olson went back to Wyoming, where he completed the purchase of the Qualey horses for the partnership on the 18th of June. Michener went to Cheyenne for a conference with J. A. Smith and Sam Moore relative to the purchase of the Smith & Moore horses, and on the 17th of June he wrote the plaintiff from Cheyenne as follows: "Will go to Omaha to-night or to-morrow with Smith and Sam to try and get the horses, but keep this to yourself. Think they can get them back. Have you bought anything yet? Did you get the Qualey horses? Let me know at Omaha what you have done. Sam is sober and fine, and is all business now. It makes things quite different. Keep me posted what you buy, so I can arrange accordingly." Michener, Smith, and Moore came together to South Omaha, as it was stated in Michener's letter they would, and there Smith made arrangements with Gallup to cancel his contract with him for the sale of the Smith & Moore horses to him, and paid Gallup \$10,000 for such cancellation; the money being advanced by John S. Cooper. As soon as this was done, on the 24th of June, Smith made a contract with Michener to sell the horses to him at \$40 per head, the \$10,000 advanced by Cooper for Gallup to be the first payment thereon. All of the horses were to be delivered

before the 15th of November, 1908. Later in the same day, and without the knowledge of J. A. Smith, a written agreement was made by Michener and Sam Moore, by which Moore was to have one-half interest in the profits of the deal. At this time Olson was in Wyoming, looking for horses to buy for the firm of Michener & Olson, and he did not learn of the purchase by Michener, of the Smith & Moore horses until he was told thereof by the foreman of the Smith & Moore ranch. Olson did not see Michener until he met him in South Omaha, shortly after, and Michener at first denied having bought the Smith & Moore horses. He afterwards admitted that he had bought them, and said that he had to take Sam Moore in on the deal in order to get it through. Olson made objections to sharing the profits of the transaction with Moore, whereupon Michener assured him that they could buy Moore out for a small sum. Under the contract, the first delivery of the Smith & Moore horses was to be made on the 2d of August, 1907, at Medicine Bow, Wyo. This first shipment was made, and the horses were sold at South Omaha, through Cooper's house. Olson did not know until after this sale that Michener did not intend to share the profits with him, and when he learned the true situation he consulted an attorney, and was by him advised to take no action at once, but to watch the sales, and keep track of the proceeds, and thereafter bring an action for an accounting, all of which Olson did. The profits derived from the sale of the Smith & Moore horses were over \$28,000.

While the defendant denies many of the more important facts recited above, and produces some evidence tending to sustain his denials and his version of some of the transactions, we think such facts are well established by the record, when the relations of the parties and their several transactions immediately preceding the purchase of the Smith & Moore horses are given their proper weight. The most serious matters, tending to throw suspicion on the correctness of the plaintiff's claim, are his attempt to buy off Sam Moore, and his failure to assert his claimed right as the horses were being

sold during the seasons of 1907 and 1908. But as to both of these matters there is a fair explanation. If plaintiff is correct in his statement that Michener assured him that Moore had to be taken into the deal to secure the horses, and suggested to him that Moore could be bought off for a small sum, it explains his action along that line, because he might well deem it wiser to surrender a small part of the profits from the horses rather than a greater sum. He says that Michener told him that Moore could be bought off for \$500 or \$1,000, and that would evidently have been a wise buy. As to the other point, plaintiff consulted a reputable attorney and acted upon his advice, and if he did so honestly, and in the belief that it pointed out the wisest course, the circumstance is entitled to but little, if any, weight against his present claim. We have given the record careful consideration, in the light of able and full oral argument on both sides, and we are united in the conclusion that the plaintiff has established a partnership in the Smith & Moore horses, and that he is entitled to recover herein. The trial court gave him a judgment for one-fourth of the profits arising therefrom, with interest, and such judgment is *Affirmed*.

CHIESA & COMPANY and PETER CHIESA, Appellees, v. THE CITY
OF DES MOINES, Appellant.

Municipal corporations: CHANGE OF STREET GRADE: RECOVERY OF
1 DAMAGES. The right to recover damages for injury to property
by reason of the alteration of the grade of a city street depends
entirely upon statutory authority.

Statutes: LIBERAL CONSTRUCTION. The rule that statutes in deroga-
2 tion of the common law shall be strictly construed does not obtain
in this state, as it is expressly provided therein that all proceed-
ings thereunder shall be given a liberal construction to promote
their objects and to assist parties in obtaining justice.

Municipal corporations: CHANGE OF STREET GRADE: RIGHT OF TENANT
3 TO DAMAGES. Under the provisions of the Code requiring a city to pay the owner of abutting property any damages suffered by reason of a change in the grade of a street, a tenant for life or for a term of years may recover injury to leased property caused by such change; the word owner as used in the statute, when liberally construed, being broad enough to include a tenant for years.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

SATURDAY, DECEMBER 14, 1912.

ACTION at law to recover damages alleged to have been sustained by the plaintiffs because of a change made by the city in the street grade fronting a certain lot and building occupied by the plaintiffs as tenants for years of the fee owner. There was a verdict and judgment for plaintiffs, and defendant appeals.—*Affirmed.*

R. O. Brennan, H. W. Byers, and E. C. Carlson, for appellant.

Miller & Wallingford, and O. H. Miller, for appellees.

WEAVER, J.—The property in question abuts upon East Locust street, one of the principal streets of Des Moines, and near the east end of the bridge which carries said street over the Des Moines river. As originally established, the grade sloped downward somewhat rapidly from the bridge eastward to a point near the property in question, whence it followed an ascending slope for a distance of several blocks. Adjacent to this grade the lot in question had been improved by the erection of a building. The plaintiff acquired the possession and use of the lot, as thus improved, in April, 1907, under lease from the owner for a term of five years. In the year 1909 a change in the grade of East Locust street was ordered by the city, raising the same about six feet in front of this lot.

The work of conforming the street to the new grade has been done, and plaintiff sues to recover damages for the consequential injuries to his leasehold interest. There was trial to a jury and verdict found for plaintiff for \$506.

The argument in support of the appeal presents the single question whether a tenant under a lease for a term of years is entitled to maintain an action of this nature. The argument by which the appellant negatives the proposition may be briefly stated as follows: The right to recover damages for injuries resulting to abutting property by reason of a change of grade was unknown to the common law, and now exists only where it is expressly provided for by statute. Our statute creates such right but limits it to the "owner" of the property so affected. A tenant under lease from the holder of the legal title is not an "owner" of the property, and, although his leasehold interest may suffer injury, the law gives him no remedy. To the soundness of this reasoning we now give consideration.

That the right to recover damages occasioned by the act of the public authorities in altering the grade of a city street exists only by reason of some statute providing therefor may

be admitted for the purposes of this case. In
 1. MUNICIPAL CORPORATIONS: a very early case (*Creal v. Keokuk*, 4 G.
 change of street grade: Greene [Iowa] 47) the court, feeling bound
 recovery of damages. by what it believed was the weight of
 authority, expressed its reluctant assent to that view. That
 precedent has since been cited with approval. *Cotes v. Davenport*, 9 Iowa, 227; *Russell v. Burlington*, 30 Iowa, 267; *Farmer v. Cedar Rapids*, 116 Iowa, 324.

The statute under which plaintiff asserts his alleged right of recovery reads as follows: "When any city or town shall have established the grade of any street or alley, and any
 2. STATUTES: liberal construction. person shall have made improvements on the
 same, or lots abutting thereon, according to
 the established grade thereof, and such grade
 shall thereafter be altered in such a manner as to damage,

injure or diminish the value of such property so improved, said city or town shall pay to the owner of such property the amount of such damage or injury." Code, section 785. It is manifest from the foregoing that the decision of the question thus presented turns entirely upon the word "owner," as used in the statute, and whether it may properly be construed to include tenant as well as holder of the title.

The appellant starts out with the proposition that the statute, being in derogation of common law, must be given a strict construction. That this rule prevails in many jurisdictions is quite true. It has, however, a much less restrictive effect in our procedure because of our statutory rule of construction providing that "the rule of the common law that statutes in derogation thereof are to be strictly construed had no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." Code, section 3446. The old rule has at times been quoted by our courts with apparent forgetfulness of this wholesome provision, but a statute so clearly in accord with essential justice and fairness ought not to be ignored or allowed to fall into disuse.

The word "owner" is of frequent use in our statutes pertaining to property and property rights, and, like most words, its significance is subject to some degree of variance, dependent

3. MUNICIPAL CORPORATION: change of street grade: right of tenant to damages. upon its context and the subject-matter to which it is applied. In common speech it is doubtless most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. As used in law, it is very often given a wider and more comprehensive meaning. In its strictest sense, the owner of land is he who had the sole right of dominion, use, enjoyment, and disposition. It may happen, however, and does happen every day, that with respect to a given item of real property the various elements or estates which together make up what we may call

absolute ownership are vested in different persons. One may hold the legal title, another the equitable title, another a tenancy for life, and another a term of years. Each owns a property right in the land, and each is, for many purposes, the actual owner thereof. The statutes of the state expressly note the existence of different estates in the same land, and inferentially recognize the several holders of such distinct estates as owners. It is provided that the words "land," "real estate," and "real property" shall be held to include lands, tenements, hereditaments, and *all rights thereto and interests therein*, equitable as well as legal. Code, section 48 (8). And the word "property" includes "real property." Code, section 48 (10). A tenant for life or for a term of years of a city lot or other land certainly has a right and interest therein. He is therefore an owner of the property to the extent of that interest; and it would seem to follow of necessity that the statute which gives the right to recover for damages to the property includes damages to each and every estate or interest therein, legal or equitable. In pursuance of that conception or definition of property, this court has held the word "owner" to include the wife of a husband who holds title to a family homestead. *Adams v. Beale*, 19 Iowa, 68. The court there says that any right which, in law or equity, amounts to an ownership in land, any right of entry upon it, to its possession or enjoyment, or any part of it which may be deemed an estate, makes the person an owner, as far as it is necessary to entitle him to redeem the land from tax sale. See, also, *Cummings v. Wilson*, 59 Iowa, 14; *Swan v. Harvey*, 117 Iowa, 58. A mortgagee is an owner, within the statute providing for the condemnation of land for public purposes. *Severin v. Cole*, 38 Iowa, 463. The word "owner," as used in the mechanic's lien statute, has been held to include "any person who has an estate or interest in the land." *Monroe v. West*, 12 Iowa, 119. As supporting this view, see *Gitchell v. Kreidler*, 84 Mo. 476; *Benjamin v. Wilson*, 34 Minn. 517 (26 N. W. 725); *Gerrard v. Railroad Co.*, 14 Neb.

270 (15 N. W. 231); *Loso v. Sutherland*, 38 Mich. 171; *Mixon v. Stanley*, 100 Ga. 377 (28 S. E. 440); *Higgins v. San Diego*, 131 Cal. 308 (63 Pac. 470); *Telephone Co. v. Marsh*, 96 App. Div. 122 (89 N. Y. Supp. 79); *Parker v. Railroad Co.*, 79 Minn. 373 (82 N. W. 673); *Smith Co. v. Labore*, 37 Kan. 480 (15 Pac. 577). In *Schott v. Harvey*, 105 Pa. 228 (51 Am. Rep. 201), this language is used: "A tenant for years, a tenant for life, and a remainderman in fee is each an owner." Indeed, it seems to be thoroughly established that the term "owner" will be held to include the owners of any distinct interest or estate in the land less than a fee, whenever the connection in which it is used, or the apparent purpose of the statute, is such as to call for the broader construction. If we look to the reasonableness and justice of the case, there is no good ground upon which the owner of the fee ought to be given the right to recover which does not apply with at least equal force to the tenant, who suffers injury by the same wrong. As we have already noted, this court, in the pioneer case of *Creal v. Keokuk*, *supra*, expressed its regret at the absence of a statute holding the city to liability for injury in such cases. Thereafter, and apparently to remedy this defect in the law, the statute under consideration was passed. If it is to be given the construction for which the city contends, and its benefits restricted to owners of the fee only, it furnishes but a very partial and imperfect remedy for hardships which the individual citizen ought not to be compelled to bear alone. The tenant, even more than his landlord, is often exposed to irremediable injury from improvements of this nature. The improvement may be such as to destroy in a large measure the value of the use for which the tenant leased the premises, while the actual market value of the fee has been enhanced rather than decreased. While the city is not here prosecuting a condemnation proceeding, the effect of it upon the plaintiff's rights partakes very much of the same nature. True there is not physical invasion or taking of the property, but there is an interference with its use and a taking away of its value

to promote the interest of the public at large, and the statute which provides for compensation for injuries so inflicted ought not to be given a construction which denies relief to persons whose rights have thus been invaded, unless the language of the act clearly requires it. No injustice is done by requiring the municipality, as a whole, to pay for the injury it inflicts in carrying on improvements for the general public good. The statute as it stands is capable of a construction which prevents injustice, and we think it the duty of the courts to so interpret it. The trial court did not err in holding plaintiff entitled to maintain the action.

Question has been raised by the appellee whether, under the record as presented, the city has any standing in this court to raise the principal question argued by counsel, because of failure to make such point in the court below, except by amendment to motion for new trial. As we are disposed to hold against appellant upon the merits of the appeal, we do not undertake to pass upon this question of practice.

The judgment below is therefore *Affirmed*.

FIRST NATIONAL BANK OF TITONKA V. J. CASEY and L. HAL-
VORSON, Appellants.

Dec 14, 1912

Appeal by infant: JURISDICTION: DISMISSAL. Although an appeal
1 taken by a minor himself rather than through his guardian is irregular, still the court will acquire jurisdiction thereby, and the appeal should not be dismissed for that reason.

Appeal: PARTIES: DISMISSAL. A member of a co-partnership against
2 whom judgment was entered on default need not be made a party to an appeal by the other, as a reversal of the judgment could not affect him prejudicially; and failure to serve the co-partner with notice was not ground for dismissal of the appeal.

Infants: CONTRACTS: DISAFFIRMANCE: EVIDENCE. A minor is bound
3 by his contracts regardless of whether he is under guardianship, unless he disaffirms within a reasonable time and returns the property received which is still in his possession, except in cases where

the contract was obtained by misrepresentation of his age, or from having engaged in business as an adult and the other party had good reason to believe him capable of contracting. In the instant case the question of whether plaintiff had good reason to believe the minor capable of contracting was for the jury.

Same: EVIDENCE OF MINORITY. The appearance of a minor as a witness in an action to which he was a party, was a matter to be considered in determining whether from having engaged in business on his own account the other party to the contract had good reason to believe him a minor.

Appeal from Kossuth District Court.—HON. A. D. BAILIE,
Judge.

SATURDAY, DECEMBER 14, 1912.

ACTION on promissory notes resulted in verdict being directed against defendant Halvorson and judgment entered thereon. He appeals. *Reversed.*

Oliver Gordon and Quarton & Hastings, for appellant.

E. A. & W. H. Morling and E. V. Swetting, for appellee.

LADD, J.—One John Casey and Carl Halvorson formed a partnership, which operated a meat market in Titonka in September, 1909. After a short time Halvorson sold his interest in the business to his brother, L. Halvorson, who became a partner of Casey in the business. About August 1, 1910, the latter sold out to the defendant, who conducted the business in his own name until October 3d following, when the building containing the market was burned down. The partnership composed of Casey and defendant was indebted to the plaintiff on notes executed to cover moneys used in carrying on the business, and this action was brought to recover the amount due thereon. Judgment by default was entered against Casey. Halvorson suggested his minority,

and that his mother, Emma Halvorson, had been appointed his guardian August 28, 1900, and prayed that she be permitted to defend. Thereupon the guardian filed an answer putting in issue the allegations of the petition with respect to the indebtedness, and alleging that the defendant would not attain his majority, until December 19, 1911, and praying that he go hence with his costs. The plaintiff in its reply alleged that the moneys were actually advanced to defendant for which the notes were executed while he was engaged as an adult in operating a meat market at Titonka in partnership with Casey.

I. Notice of appeal served October 25, 1911, recited that the defendant L. Halvorson appealed, and was signed by counsel for appellant as "attorneys for defendant." One

1. APPEAL BY
INFANT: Jur-
isdiction:
dismissal.

of the grounds of the motion to dismiss is that the appeal should have been prosecuted by the guardian, instead of defendant. Section 3480 of the Code requires an action by a minor to be brought by his guardian, or, if he has none, then by his next friend, and section 3482 that the defense of a minor must be by his regular guardian or one appointed to defend. But the court is not without jurisdiction in an action brought by a minor in his own name, even though the judgment may have been erroneous. *Parkins v. Alexander*, 105 Iowa, 75. Nor is the defense by guardian essential to the jurisdiction of the court, though a judgment against an infant in the absence of guardian, regular or *ad litem*, is erroneous. In re *Estate of Strange*, 131 Iowa, 583; *Wise v. Schloesser*, 111 Iowa, 16; *Rice v. Bolton*, 126 Iowa, 654; *Harris v. Bigley*, 136 Iowa, 307. The infant is the real party in interest, and, though suit should be brought or defended as prescribed in the statutes cited, the omission so to do is an irregularity rendering the judgment erroneous but not void and subject to correction by procedure defined in the Code. At the common law an infant was required to sue and defend by guardian. Later, by act of Parliament, he was permitted to act through his next

friend also. *Williams v. Cleaveland*, 76 Conn. 426 (56 Atl. 851.) And, though he might prosecute a writ of error by his next friend, yet if he did so in his own name, and there was a joinder in error, his disability was waived. *McClay v. Norris*, 9, Ill. 370. In *Ramsey v. Keith* (Ky.) 77 S. W. 693, an appeal was prosecuted by an infant, and the court denied a petition to dismiss on the ground that appellee by previously submitting a motion to affirm as a delay case had waived the objection that appellant was without capacity to sue. That the appeal was taken by the minor, acting for himself, instead of through the guardian, undoubtedly was irregular, but the court acquired jurisdiction thereby. Of course, he subsequently might have disaffirmed what he had done, but, instead, upon the filing of the motion to dismiss, which was long after he had attained his majority, he resisted the same, and thereby confirmed his action in taking the appeal. For these reasons, this ground for dismissal of the appeal should be denied.

The other ground of the motion to dismiss is that notice of appeal was not served on Casey. He was a coparty, and must have been served with such notice, unless it can be said that a reversal of the judgment will not prejudicially affect him. Section 4111, Code; *Clayton v. Sievertson*, 115 Iowa, 687. Regardless of the issue as to Halvorson, Casey was liable as partner, and judgment was entered against him by default. This would not be affected by any ruling in the case against Halvorson, and the only contingency in which prejudice might result from passing on the errors assigned in this case would be in the settlement of the affairs between Casey and Halvorson. But the judgment finally entered in this suit of plaintiff against Halvorson would not constitute an adjudication in any action between Casey and Halvorson for the adjustment of their partnership affairs. Possibly such judgment might be valuable as evidence in an action between Casey and Halvorson as tending to establish Halvorson's obligation as

2. APPEAL:
parties: dis-
missal.

a member of the partnership; but, should the judgment in this suit finally be in Halvorson's favor, this would not be conclusive as between Casey and Halvorson. In the settlement of their relative obligations growing out of the partnership, the most that can be said, then, is that the ruling in this case might incidentally affect evidence to be used in possible litigation between Casey and Halvorson, but, as it would not be conclusive therein, it cannot be said to prejudicially affect the rights of Casey. In other words, if as a result of the ruling on this appeal judgment should be finally entered in favor of Halvorson, such judgment would not constitute an adjudication as to the relative obligations of Casey and Halvorson in the adjustment of their partnership affairs. This case is readily distinguishable from *Fisher v. Chaffee*, 96 Iowa, 15, where a judgment had been obtained against a principal and two sureties, and it was held that in an appeal by one surety notice thereof must be served on the other in order to confer jurisdiction. It follows that neither of the grounds of the motion to dismiss the appeal is sufficient, and it is therefore overruled.

II. Appellant contends that there was error in directing a verdict for plaintiff for that during the transactions in controversy defendant was under guardianship, and whether

3. INFANTS : con-
tracts : disaf-
firmance : evi-
dence.
plaintiff had good cause to believe defendant an adult did not conclusively appear. In this state a minor is bound by his contracts, regardless of whether he is under guardianship, unless he disaffirms within a reasonable time after having attained his majority, and restores the property received thereunder and remaining in his control (section 3189, Code), but "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting." Section 3190, Code.

The defendant was engaged in operating a meat market.

The business in behalf of plaintiff was transacted with him through its cashier, Armstrong. Neither he nor any other officer of the bank knew of the appointment of a guardian of defendant in a neighboring county, and, under the language of the statute, constructive notice of his status is not to be imputed. No exception is contained therein. That minors may disaffirm is the rule to which there are two exceptions: (1) Where he has misrepresented his age; and (2) where he has engaged in business as an adult. But in either event, from such misrepresentation as to age, or being so engaged in business, the other contracting party must have had good reason to believe him capable of contracting. These exceptions are not limited by statute to minors not under guardianship but apply to all, and whether there was "good reason to believe" the minor dealt with capable of contracting necessarily must depend on the circumstances of each particular case.

Armstrong testified that defendant was engaged in the buying and selling incident to the operation of a meat shop, that an account was kept with plaintiff, numerous deposits made and checks issued thereon by him for Casey & Halvorson or for himself after buying Casey out, and that he entertained no suspicion that he was a minor, but believed him to be an adult. Wolfe thought his appearance that of an adult, while his mother testified that "he did not look as though he was twenty-one years old."

The defendant was a witness before the jury, and, of course, was subject to their inspection. He was still a minor, and certainly his appearance was a proper matter for the jury

to consider in determining whether Armstrong, in acting for the bank, had good reason for supposing him of age. *Hermann v. State*, 73, Wis. 248 (41 N. W. 171, 9 Am. St. Rep. 789); *Commonwealth v. Hollis*, 170 Mass. 433 (49 N. E. 632); *Jones v. State*, 32 Tex. Cr. R. 108, (22 S. W. 149); 1 Wig.

4. SAME: evidence of minority.

Evidence, section 222, and note. See *contra Bird v. State*, 104 Ind. 384 (3 N. E. 827), but, saying that were the question not foreclosed by prior decisions, some members of the court would be of the view here expressed. In *State v. Robinson*, 32 Or. 43 (48 Pac. 857), the court held that not allowing a witness to testify from the appearance of a person to her age was not error, where such person was present at the trial, as this would furnish no substantial aid to the jury. Though an ordinary witness, after fully describing a person, may express his opinion as to his age (*State v. Bernstein*, 99 Iowa, 5), this would be of little or no value where the witness is before the jury, and but one ground seems to have been suggested for denying consideration of appearance by the jury in determining age; i. e., that such appearance may not be preserved for the purposes of review. This court, however, is committed to the doctrine that this is not a valid objection, for experiments, not exemplified by the record, are now allowed in presence of the jury, and injured members of the body are exposed to their view in damage cases, although there is no way of accurately reproducing them in the abstracts. Moreover, in *State v. Smith*, 54 Iowa, 104, a baby two years old was shown to the jury as tending to establish resemblance. The appearance of a minor in a case like this is especially pertinent to the inquiry as it would be an important circumstance in determining whether from his having engaged in business as an adult the other party of the contract had good cause to believe him such. See *Beller v. Merchant*, 30 Iowa, 350; *Jacques v. Sax*, 39 Iowa, 367. We are of opinion that the record was such that this issue should have been submitted to the jury.

III. There is nothing in the suggestions that defendant had not disaffirmed nor returned the moneys or property received in virtue of the notes. By interposing the defense he undertook to disaffirm, and his testimony that he had none of such moneys nor property within his control was undisputed.

Because of the error in directing a verdict, the judgment is *Reversed*.

FLORENCE LAYTON, Guardian of Rockwell Y. Layton, a Minor,
Appellant, v. INTER-STATE BUSINESS MEN'S ACCIDENT
ASSOCIATION, Appellee.

Accident insurance: PERMANENT INSANITY: EVIDENCE. In this action
1 upon an accident policy of insurance, in which the association was
exempted from liability for disability or death resulting from
bodily or mental infirmity, the evidence is reviewed and held in-
sufficient to support a finding that at the time the insured com-
mitted suicide he was actuated by a temporary insane impulse,
but rather that his insanity was of a permanent character, and
therefore an infirmity.

Same: CONTRACTS: CONSTRUCTION: SUICIDE: STIPULATION AGAINST
2 **LIABILITY.** Where an accident company undertakes to insure only
against specified forms of accident, its contracts will be construed
most strictly against it and it will be held to the strict letter
and spirit thereof; but a stipulation against liability for suicide,
whether sane or insane, is competent and will be upheld.

Same: SUICIDE: PLEADING: ISSUE. The question of whether insanity
3 had any causative connection with the suicide of deceased was
not in issue under an allegation that the suicide sprang from
insanity, and was therefore not a question for the jury.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

WEDNESDAY, JANUARY 15, 1913.

ACTION on a policy of accident insurance. The insured
died by suicide. At the close of the evidence there was a
directed verdict for the defendant. Plaintiff appeals.—
Affirmed.

C. R. Sutherland and J. N. Hughes, for appellant.

Dunshee & Haines and Grimm & Trewin, for appellee.

EVANS, J.—The policy in question was issued to George W. Layton on March 29, 1910. The beneficiary named therein was Brockwell Y. Layton, the minor child of the insured. The insured took his own life on May 25, 1910. Plaintiff is the mother of the beneficiary minor and brings action as his guardian. The policy sued upon promised indemnity only for "bodily injury effected solely by external violent and accidental means." If the insured intentionally took his own life, then his death was not accidental within the meaning of the policy. The appellant does not contend otherwise.

The contention of the appellant is that the insured was insane at the time he took his own life, and that "said act causing death sprang from an insane impulse of a disordered and unsound mind." The evidence tending

1. ACCIDENT IN-
SURANCE: per-
manent insan-
ity: evidence.

to show the insanity of Layton consisted of the history of his married life which began on September 18, 1907. He was forty years of age when married, and his wife, the plaintiff herein, a young lady of seventeen. Layton was a business man and gave no special evidence of anything abnormal in his business and ordinary social relations. In his relations with his wife, however, he disclosed brutal and fiendish characteristics. This began immediately after the marriage and never ceased until his death. He was of an intense, emotional temperament, alternately profuse with terms of endearment and savage in vituperation; overbearing, domineering, suspicious, jealous, and cruel. He accused and cursed and threatened and beat his wife repeatedly, and often quickly repented. He frequently threatened to kill her and injured her seriously at various times. This history is set out in the record in large volume, and we need not set it out in more detail. On one or two occasions his wife left him and returned again. In October, 1908, the child, Rockwell, was born. About the 1st of February, 1910, the wife left him again and brought an action for divorce in the city of Cedar Rapids. She then went to her parents in Missouri. He ascertained her whereabouts and followed her

a few days later and tried to induce her to return, but without avail. He returned to Iowa and to his business. May 25, 1910, he again appeared at the home of the wife's parents, (where she was) on a farm near Springfield, Mo., and again pleaded with his wife and demanded that she return. The meeting was a strenuous one in many ways. The final question put by Layton was, "Don't you love me any more?" She answered, "I cannot." He thereupon suddenly drew a revolver and shot her twice through the body. He then turned the revolver upon himself and took his own life.

The plaintiff, having put this history in evidence, propounded to two expert witnesses a hypothetical question including the entire history and obtained from each one an opinion that Layton was of "unsound" mind. The policy sued on contains a provision for nonliability of the company for disability or death resulting from accidental injury "if the occasion of the accident be bodily or mental *infirmity*." In order to avoid this provision of the policy, it is the contention of plaintiff that the insanity of Layton was temporary and momentary only, and that it lacked the quality of permanency or continuity which is said to inhere in the meaning of the term "*infirmity*." It is argued that, though insanity is ordinarily a mental infirmity, yet, where such insanity is only a sudden insane impulse produced momentarily by some overwhelming cause, and where it passes away with the passing of the cause, it is not an "*infirmity*." It is further argued that it would have been competent for a jury in this case to have found that Layton was insane at the mere moment of shooting, and yet fail to find that he had been insane before.

Whether the distinction urged could be sustained in the light of any supposed evidence, we will not stop to consider. What is clear to us is that the evidence in this record will not permit the distinction. The hypothetical question upon which plaintiff took the opinion of her experts included Layton's entire conduct for two years and a half. To this ques-

tion the expert witnesses gave their opinion that Layton was of "unsound mind." In explanation of such opinion they further testified that his mind was unsound "all the time." Mr. Spangler was a witness on this question. He was an attorney who had been employed by Layton to defend the divorce case, and he consulted with him frequently from February to April. Plaintiff proved by this witness that Layton's mind was unsound at that time. The same is true of the testimony of Mr. Allen, an attorney of Springfield, Mo., who was consulted by Layton on his first trip to Missouri in February. Layton told Allen at that time that if his wife would not live with him she should not live at all. This witness testified that he was mentally unbalanced at that time.

It was subsequent to this time that Layton took out the policy now sued on. In the light of this testimony it would have been very insincere for the plaintiff to ask a jury to find that Layton was insane at the moment of the shooting and not before. A jury would not be justified in such a finding. It is clear, then, that the situation presents two horns upon one of which the plaintiff's case is necessarily impaled.

The defendant undertakes to insure only against specified forms of accident. The courts are disposed to construe its policy most strictly against it and to hold it to the letter

and spirit thereof. But we have held it competent to stipulate against liability for suicide whether "sane or insane." *Scarth v. Security Mutual Ins. Co.*, 75 Iowa, 346. See also, *Bigelow v. Insurance Co.*, 93 U. S. 284 (23 L. Ed. 918); *Streeter v. Life & Accident Soc.*, 65 Mich. 199 (31 N. W. 779, 8 Am. St. Rep. 882). Judicial ingenuity should not be strained to avoid such provision. To recover indemnity for intentional suicide not only works an injustice, but it operates as an incentive to suicide and to the fraudulent procurement of insurance by persons contemplating such a course.

It is further urged by appellant that, even though the

2. SAME: con-
tracts: con-
struction: sui-
cide: stipula-
tion against
liability.

alleged insanity of Layton be deemed a mental infirmity within the meaning of the policy, yet it was for the jury to say whether it had any causative connection with the suicide. It is sufficient to say that the plaintiff's petition expressly alleged, as we have above quoted, that the act of suicide "sprang" from Layton's insanity.

It is our conclusion that upon the evidence in this record a verdict for the plaintiff could not be sustained. The trial court therefore properly directed a verdict for the defendant, and its order is *Affirmed*.

W. A. THEOBALD, et al., v. PAT FLYNN, et al., and Four Other Cases.

Intoxicating liquors: PETITION OF CONSENT: SIGNATURES IN CERTAIN
 1 CITIES. In cities of 2,500 and less than 5,000 a petition of consent to the sale of liquor signed by eighty per cent of the voters of the city, or by a majority of the voters of the city and township and sixty-five per cent of the voters of the county is sufficient. It is not necessary to have sixty-five per cent of the voters of the county sign the petition in addition to eighty per cent of those of such cities.

Appeal: ADDITIONAL ABSTRACT: MOTION TO STRIKE. Where the ap-
 2 pellant's abstract did not set out a full statement of the agreed statement of facts on which the case was submitted, appellees additional abstract containing a complete copy of the same, will not be stricken, although the entire stipulation may not have been required to make the correction.

Appeal from Crawford District Court.—HON. F. M. POWERS,
 Judge.

FRIDAY, JANUARY 17, 1913.

APPELLANTS, W. A. Theobald, Velie Sowles, and J. L. McLeod, as plaintiffs, brought five injunction suits against

Pat Flinn, Catherine Flinn, and Nora Kinney, as defendants, in one case, Martin Saggau, T. C. McCarty, John Klinker, William Keopke, and John Saggau, defendants in the others, alleging that defendants were maintaining nuisances in the sale of intoxicating liquor contrary to law. The cases were tried in the court below on an agreed statement of facts, and by agreement the cases are tried together in this court. The injunctions were denied. The plaintiffs appeal.—*Affirmed.*

John F. Joseph, for appellants.

Connor & Lally and *E. K. Burch*, for appellees.

PRESTON, J.—These cases were tried in the district court, before the decision of this court in *Conly v. Dilley*, 153 Iowa, 677, and the question as to the number of saloons allowed under the so-called Moon Law is not in controversy in this case; the parties have so agreed in argument. The question here presented has not heretofore been determined by this court, and it is agreed that the sole proposition is whether or not, because 80 per cent. of the legal voters of the city of Denison did not petition for the sale of liquors, the defendants should be enjoined. The city of Denison is a city of over 2,500 and less than 5,000 inhabitants. The stipulation as to the facts is as follows:

It is hereby stipulated by and between the parties to the above-entitled action that the evidence in the case shows that the defendant Pat Flinn did not secure the consent of 80 per cent. of the voters of the city of Denison, as shown by the poll list of the preceding general election of 1908, and it is agreed that a petition of general consent was circulated in the county of Crawford, and that more than 65 per cent. of the voters of the county, as shown by the poll list of the said county at the last preceding general election of 1908, petitioned the board of supervisors for the sale of intoxicating liquors in the county, and that the board of supervisors so determined and made a record to such effect; and at the

same time that more than 50 per cent. of the voters of the city of Denison, and the township in which Denison is situated, petitioned for the sale of intoxicating liquors, and that the board of supervisors so found and determined, and made a record showing the fact, prior to the time the city council granted resolutions of consent to sell intoxicating liquors to the defendant Pat Flinn. If defendant has no legal right to run his saloon without 80 per cent. of the voters of the town or city of Denison petitioning therefor, then a permanent injunction should be granted; if a majority of the voters of the city of Denison and of Denison township, in which it is situated, in addition to 65 per cent. in the county, are only required to petition for the sale of intoxicating liquors, then he should not be enjoined. It is agreed that the population of Denison, Iowa, is and was at the time the petition was circulated, over 2,500 and less than 5,000, as shown by the last federal and state census. Except as hereinbefore stated, it is stipulated and agreed that the provisions of the mulct law of the state of Iowa, in so far as the defendant is concerned, have been complied with. It is also agreed that Catherine Flinn and Nora Kinney, are the owners of the property, and have knowledge of the facts herein set out. The case is submitted to the court on the above statements of facts, which are agreed to be the evidence in the case, on the application for a permanent injunction. [Properly signed.]

A like stipulation was made in each of the cases; the names of the parties and description of property being different.

I. The controversy arises over the construction of sections 2448 and 2449 of the Code, or certain parts thereof.

1. INTOXICATING LIQUORS: petition of consent: signatures in certain cities.

The first part of section 2448 refers to cities of 5,000 or more, and it is not necessary here to quote that part of the section. The latter part of said section, just before division 1, provides:

And in any city of over twenty-five hundred and less than five thousand inhabitants, when a written statement of consent that intoxicating liquors may be sold in such city, signed by eighty per cent. of the voters residing in such city,

voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor, and shall by the board of supervisors at a regular meeting, or at a special meeting called for that purpose, have been held sufficient, and its findings entered of record which statement when thus found sufficient shall be effectual for the purpose herein contemplated until revoked, said city shall come within the provisions of this section.

Section 2449 provides:

In order that any city or town or city acting under special charter of less than five thousand inhabitants may come within the provisions of the preceding section, except as is otherwise provided, the following additional condition must be complied with: A written statement of general consent shall be filed with the county auditor, signed by sixty-five per cent. of all of the legal voters who voted at the last preceding general election, as shown by the poll list of said election, residing within such county and outside of the corporate limits of cities having a population of five thousand or over; but no such statement of general consent shall be construed as a bar to proceedings against persons selling intoxicating liquors in towns situated in townships of which less than a majority of the voters of the township, including the town, have signed the statement of general consent; nor shall it be construed as a bar in any town in which a majority of the voters do not sign said statement.

The appellants' contention, as their counsel state it, is that in cities the size of Denison, in order to legalize the sale of intoxicating liquors in said city, there must be a petition of general consent showing the signature of 80 per cent. of the voters in said city, and that this requirement is in addition to that mentioned in section 2449, requiring the consent of 65 per cent. of the voters of the county in which the city is situated.

Appellees' contention, as their counsel state it (after quoting the latter part of section 2448, and which we have set out in this opinion as the first quotation), is: In such case

no attention whatever need be paid to the balance of the county, as to whether or not the petition was either circulated in or signed by 65 per cent., or any other number, of the voters of said county. And further they say: We contend that the statement "except as otherwise provided" refers absolutely to, and is controlled by, that portion of section 2448 above referred to.

We think appellant's contention in this respect is not sound, because that would mean that a party desiring to sell liquor in a town the size of Denison would have to get 65 per cent. of the voters of the county, outside of cities of 5,000, and only a majority of the voters in said city, and the township in which the city is situated, which would be inconsistent with getting 80 per cent. of the voters in such city. The latter part of section 2449 provides for obtaining a majority, and, as we say, that would be inconsistent with requiring them to get 80 per cent.

Appellees' argument is, as we understand it, that the latter part of section 2448, heretofore quoted, required a person desiring to sell liquor in a city of that size—that is, a city over 2,500 and under 5,000—to get 80 per cent. of the voters in such city, but they insist that they do not have to get 65 per cent. of the voters in the county.

It must be conceded that the two statutes are not well or clearly drawn. That part of section 2448 which we have quoted was not contained in the original act as passed by the Legislature (Acts 25 G. A., chapter 62, section 17), but did provide for cities of 5,000 or more, and then provided, in the different subdivisions of said section, that a statement signed by a majority of the voters of such city, and a compliance with a number of other conditions, would be sufficient to bar prosecutions. The latter part of section 2448 (before subdivision 1) was legislated into the Code of 1897 at the same time section 2449 was inserted. The meaning of section 2449 is, we think, and so hold, that in cities and towns of less than 5,000 the petition must contain the signatures of 65 per cent. of the

voters of the county, and outside of the corporate limits of cities having a population of 5,000 or over; also a majority of the voters of the city or town, and a majority of the voters of the township, except as otherwise provided, in order to come within the provisions of the preceding section. The latter part of section 2448 does otherwise provide; that is, as to cities over 2,500 and less than 5,000, a petition signed by 80 per cent. of the voters of such city is sufficient. In such a city they may proceed either way; that is, get 80 per cent. of the city, or a majority of the city, and a majority of the township, and 65 per cent. of the county, etc.

The additional condition referred to in section 2449 means that, in addition to the numerous conditions mentioned in the different subdivisions of section 2448, they must get 65 per cent. of the county, etc., and does not mean that, in addition to getting signatures of 80 per cent. of the voters of such city, the signatures of 65 per cent. of the voters of the county and a majority of the town and township must be obtained.

It follows that cities the size of Denison may come within the provisions of section 2448 by obtaining the signatures of 80 per cent. of the voters, and complying with the other conditions therein mentioned.

II. Appellants have filed a motion to strike appellees' additional abstract, which was submitted with the case. Appellants did not set out an exact copy of the agreed statement of facts; appellees did do so. It may not have been necessary for appellees to set out the entire stipulation, to make the corrections; but, under the circumstances, we think the motion should be overruled.

The decision of the district court was right, and its judgment is *Affirmed*.

2. APPEAL: additional abstract: motion to strike.

COLEMAN JOHN, Appellant, v. JASPER PENEGAR and ANNIE
PENEGAR, Appellees.

Vendor and vendee: RESERVATION OF LIFE USE: EVIDENCE. In this
1 action to obtain possession of real property, the evidence is re-
viewed and held to sustain a finding that a purchaser of the land,
in having the conveyance taken in the name of another, made an
agreement with the grantee that he should have the life use and
occupancy of the premises.

Same: GOOD FAITH PURCHASER: NOTICE. A purchaser of land who
2 knew that the same was and had been in the possession of an-
other for a long series of years, and that the grantor had never
occupied the same, and who was told that he had better consult
the occupant of the premises, was put on inquiry as to the rights of
the occupant and took the title subject thereto.

Appeal from Davis District Court.—HON. M. A. ROBERTS,
Judge.

TUESDAY, FEBRUARY 11, 1913.

ACTION brought by plaintiff to obtain possession of nine
acres of land. The case was commenced before a justice of
the peace. Defendants filed an equitable answer, and the
cause was transferred to the district court. The cause was
then transferred to the equity calendar, and, after a trial to
the court, a decree was entered finding that defendant Jasper
Penegar was entitled to the use of the land during his life,
and that plaintiff was not entitled to the possession. The
facts are more fully stated in the opinion. Plaintiff appeals.
—*Affirmed.*

Payne & Goodson, for appellant.

W. F. Garrett and Ellsworth Rominger, for appellees.

PRESTON, J.—Many matters were set up in the pleadings by both parties. As to some of these, there is no evidence, and others are not applicable to the case made. The appellant has argued some things which are not pleaded, and which are not now material. His principal contention is that the evidence is not of that clear and satisfactory character required in such cases. We have not been favored with argument by appellee. Briefly stated, the controversy, so far as plaintiff is concerned, is whether he is entitled to the possession of the land, and that is all the relief asked by him. In his reply, he pleads the statute of limitations as to the defendants' claim that the deed hereinafter referred to is a mortgage; he also pleads the statute of frauds. He introduced in evidence a deed from John Penegar to plaintiff, dated September 29, 1909, also a deed from Dexter Richards to John H. Penegar, purporting to bear date January 7, 1889, notices to quit, and the original notice of suit before the justice, and rested.

The defendants state their claim in different ways in their pleading, one of which is that the deed heretofore referred to, executed by Richards to John Penegar, was in fact a mortgage, and that he (Jasper) was in fact the owner of said land at the time said deed was executed, and that, at the time said deed was executed, he had an agreement with John Penegar, by which the said Jasper was to occupy the land during the life of said Jasper; that he, in writing, directed the grantor, Richards, to name said John Penegar as grantee, and claims that the plaintiff, Coleman John, had notice of his rights and equities before plaintiff obtained his deed from John Penegar, knew that said John Penegar had no right to convey, and had no title that he could convey. Other matters were set up by him; but the evidence was directed mainly to the proposition as to whether defendant had the right to use said land during his life.

The question is then, as we view it, whether defendant Jasper had rights in the premises, and, if so, what they were,

and whether plaintiff had notice thereof before his purchase of the land. The determination of the controversy depended on the evidence, and was almost entirely a question of fact. There was a conflict in the evidence. We shall not attempt to review all of it, but enough to show that the decree has support, and that the findings of the trial court, he having seen and heard the witnesses, should not be interfered with. The court found in the decree: "That the legal title and ownership of the land in controversy was placed in the name of John H. Penegar by a written order of Jasper Penegar in August, 1893, for the purpose of securing said John H. Penegar for the sum of \$112.50 paid to Steckel, for Jasper Penegar, by John H. Penegar, to release said premises from a lien of said amount held by said Steckel against said land, and that it was a part of the arrangement, at the time, that Jasper Penegar was to have the right to use and occupy said land as a home, without any interest charges on said sum during his lifetime; and, Jasper Penegar being in possession of the land under said arrangement when John H. Penegar sold same to plaintiff, the court holds that the plaintiff, Coleman John, had constructive notice when he purchased said land of John H. Penegar of the rights of Jasper Penegar, and that although the deed from John H. Penegar to John was one of general warranty, still the said plaintiff was not entitled to the possession of said real estate when this suit was begun." The decree dismissed the plaintiff's petition, and rendered judgment against him for costs.

I. The plaintiff claims that the deed from Richards to John Penegar was in fact, what it purports to be, an absolute deed, and that said John Penegar was to be the owner.

1. VENDOR AND
VENDEE: reservation of life
use: evidence.

Defendant Jasper is a cripple, illiterate, and not able, without assistance from his relatives and neighbors, to support himself and mother.

He was not a great success as a witness. The mother, who at the time of the trial was seventy-seven years of age, had lived with Jasper on this land since 1889. John Penegar

had, from time to time, assisted his brother and mother more or less.

The undisputed evidence shows that in 1889 Jasper made a written contract with one Steckel for the purchase of this land; that a bond for a deed was given; and the plaintiff in this case admits, in his reply, that Jasper Penegar first purchased the land from Amos Steckel, trustee, and that bond for a deed was executed therefor. Richards executed the deed in question January 7, 1889; that the name of the grantee was left blank; that in August, 1893, at the time of the alleged agreement between John and Jasper, said Steckel inserted the name of John Penegar therein; that at the same time there was indorsed, in writing, on the written contract between Steckel and Jasper, the following: "Please make deed hereunder to John H. Penegar. Jasper Penegar."

The testimony of Jasper Penegar, taken by itself as to what occurred at the time of the transaction last referred to, is not entirely satisfactory; but, taking all the evidence together, and all the circumstances, we are satisfied, as was the trial court, that there was an agreement between Jasper and his brother that Jasper should have the right to occupy and use it during his life. Jasper so testifies, and he claims that he borrowed the money of John to pay off the amount then due Steckel, which was \$112.50. Jasper had, prior to that date, paid at least \$98 on the purchase price, and perhaps more. The original purchase price was \$150. The brother claims there was no loan, but that he furnished the money to pay off the indebtedness. Jasper testifies, in substance, that the agreement was that he should have the right to use the land without paying any interest; and the brother John admits that he did not expect to charge any interest, and that he did not intend that Jasper or his mother should be removed from the place after the deed to him was made; that he intended and expected them to still live on the place, and that he did permit them to live thereon from 1893 up to the time of the commencement of the suit, which was about seventeen

years. Jasper and his mother had occupied the place about five years prior to 1893; that is, since his contract of 1889. John Penegar also testifies that he expected Jasper to pay the taxes; as to the taxes for seventeen years he answered, "I supposed him living on there and me giving him the money he would see to that." He says that for a part of the time he furnished the money to pay the taxes. This last matter is denied by Jasper.

There was other evidence both ways; but we think we have set out enough to show the general tendency of the evidence. We are satisfied with the finding of the court on this proposition.

II. The next question is as to whether the plaintiff herein, Coleman John, had notice of the rights of Jasper. He testifies that he had lived near this land in question, and

2. SAME: good
faith pur-
chaser: notice. knew, of his own knowledge, that Jasper was in possession and living on the place and carrying it on for about eighteen years, and that he did not think John Penegar ever lived on the place. John Penegar testified that, after he had agreed to sell to plaintiff, but before the deed was executed, he told Jasper and his mother that he had sold the land, and that Jasper got mad and claimed that he (John) did not own it; that the deed was made out after he told plaintiff about this trouble with his brother; and that plaintiff made no objection. He modified this statement somewhat on his re-examination, and says that all he told plaintiff was that Jasper got mad and went to cursing, and was trying to raise trouble, when he told him he had sold the land. Witness Stufflebean testifies that plaintiff talked to him about buying the land, and that the witness asked plaintiff if the land did not belong to Jasper and his mother, and if he had not better go and see Jasper. If plaintiff had inquired of Jasper, he could have learned what the claim was. There may be other circumstances which we have not noticed bearing on this question; but we think enough was shown here to put plaintiff upon inquiry, and to

give him notice that Jasper had rights in the premises. *Truth Lodge v. Barton*, 119 Iowa, 230; *Allen v. McCalla*, 25 Iowa, 482; *Wilson v. Miller*, 16 Iowa, 111; *Watters v. Connelly*, 59 Iowa, 217; 29 Cyc. 1114.

Enough has been said to show that the decree of the trial court was just and right. It ought to be, and is, *Affirmed*.

CYRENIUS L. McCASH, Trustee, Appellee, v. MARY BELL; DERBY, Appellant, MILTON M. DAYTON and WILLIAM BARTSCHER, Appellees.

Trusts: CONSTRUCTION: BENEFICIARIES. In this action to determine
1 the beneficiaries under a trust deed it appeared that the donor had previously created a life estate in the property, but by the terms of the deed the trustee was directed, in case the life tenant survived her and died without issue, to convey the property to the heirs of the donor in such shares as they would have received had she died owning the property. The donor died testate and bequeathed the residue of her property to her children, including the life tenant. *Held*, that as the duties of the trustee were fixed and irrevocable by the terms of the deed itself and in no manner subject to the direction of the grantor, the identity of the beneficiaries to whom the trustee was to convey was to be determined from the deed, independently of the will.

Same: The provision of the trust deed that in case of the death of
2 the life tenant without issue the trustee was to convey the property to the heirs of the donor, fixed the class who should receive the property as grantees, and amounted to a distribution of the property among living children of the donor and the representatives of those deceased.

Same: WILLS: CONSTRUCTION. Under the provisions of the trust
3 deed in suit, directing a conveyance of the property to the children of the life tenant upon her death, if any, but in case she left no issue then to the children of the donor, the life tenant though surviving the donor, but without issue, took no interest in the remaining estate which would pass by her will.

Appeal from Des Moines District Court.—HON. W. S. WITHROW, Judge.

TUESDAY, FEBRUARY 11, 1913.

ACTION brought by the plaintiff as trustee to determine the beneficiaries of a certain trust deed. A controversy is presented by the claims of the parties as to their respective interests in certain real estate described in the trust deed. It is the claim of appellant Derby that she has two-thirds interest in such real estate. As an alternative claim she contends that, if she is not entitled to two-thirds, she is entitled to at least two-fifths thereof. The trial court awarded her one-fourth thereof only, and she has appealed. The grounds of her contention are stated in the opinion.—*Affirmed.*

Blake & Wilson, for appellant.

Seerley & Clark, for appellee McCash, Trustee.

W. L. Cooper, for appellee Dayton.

Power & Power and *A. M. Antrobus*, for appellee Mennen.

EVANS, J.—The property in controversy is a certain lot in the city of Burlington. The parties all claim under their ancestor, Mary McCash, who was the owner of said lot prior to January 27, 1893. On that date she conveyed to her daughter Grace a life estate to such lot. On September 27, 1893, she conveyed the remainder by "trust deed" to the plaintiff herein. Such conveyance was made in express terms subject to the life estate of her daughter Grace. The duty of the trustee was specified in the first and second sections of the trust deed as follows:

First. That if at the death of my daughter Grace L. McCash, if she shall have been married and shall have child or children living, or shall have had child or children and he or they shall have died leaving issue, I direct my trustee

herein named to execute to the said party or parties a deed conveying the title to the west seventy-eight (78) feet of said lot nine hundred and twenty-four (924), original city of Burlington, Iowa, in such shares as they would have received had the said Grace L. McCash died seised of the said property in fee simple..

Second. If said Grace L. McCash die, and there are no beneficiaries to take said property, as provided in section 1, then I direct my trustee herein named to execute this trust by conveying the title to the west seventy-eight (78) feet of said lot nine hundred and twenty-four (924), original city of Burlington, Iowa, to the grantor herein, Mary McCash, if she be living, and if she be dead, that said trustee execute a deed to the heirs of said Mary McCash in such shares as they would have received had the said Mary McCash died owning the said property in fee simple.

Mary McCash was the mother of five children. Before her death, two of these had died, each leaving, respectively, an only child. These grandchildren appear in the record as Dayton and Bartscher, and it is conceded that each is entitled to take the share of his deceased mother. Mary McCash was survived by three living children, viz., the plaintiff, Mrs. Derby, and Grace McCash, since deceased. Some time prior to February, 1911, Mary McCash died testate. In February, 1911, Grace McCash died testate, leaving no husband nor issue. The will of Mary McCash was executed in 1900. It contained no specific reference to the real property described in the trust deed. It did contain a residuary clause disposing of all "residue" in equal parts to her three living children, Cyrenius L. McCash, Mary Belle Derby, and Grace L. McCash. Grace McCash by her will made the defendant Mrs. Derby her sole beneficiary, and bequeathed to her all her property of every kind.

It will be noticed from the second section of the trust deed above quoted that, if Grace McCash survived her mother and died without issue, then the trustee was directed to "execute a deed to the *heirs* of said Mary McCash in such

shares as they would have received had the said Mary McCash died owning the said property in fee simple." It is the contention of Mrs. Derby that, by this provision of the deed, the trustee was bound to take notice of the will of Mary McCash, and to convey the trust property to the beneficiaries named in such will. She contends, further, that she is entitled to take one-third of the property under the residuary clause of her mother's will, and that she is entitled to take another one-third thereof as sole beneficiary of the will of her sister Grace. To put it in another way, she contends that the will of her mother fixed the grantees to whom the trustee should convey, and that, under such will, Grace would take one-third share, and that such share inured to the benefit of Mrs. Derby as sole beneficiary of the will of Grace. If this contention should not be sustained, then, as an alternative, she claims that Grace would take one-fifth of the property as heir of her mother, and that such share would inure to the benefit of Mrs. Derby as sole beneficiary of the will of Grace.

I. There is a fallacy that runs through the argument of the appellant, in that it is assumed therein that the trust deed executed in 1893 and the later will of Mary McCash should be construed together as one testamentary instrument. So far as the title to this particular lot is concerned, the will of Mary McCash is quite foreign to the case. The will of Grace is still more so. The beneficiaries of the trust deed will take the title through the trust deed and through nothing else. In the trust deed before us the trust was fully declared and its conditions specified. No power of revocation was reserved nor was any interest in the property retained. True, one contingency was specified wherein it would become the duty of the trustee to convey the property to the grantor, but such contingency never happened. Whichever of the specified contingencies should happen, the duty of the trustee was fixed and irrevocable by the terms of the deed itself, and was in

1. TRUSTS: construction: beneficiaries.

no manner subject to the will or direction of the grantor. It is conceded of record that the grantor parted with possession of the property at the time of the conveyance of the life estate to Grace, and that she never exercised any dominion over the same thereafter. The effect of her trust deed was to pass from her the title to the remainder, and to transfer it to the trustee for the purpose specified. See *Craven v. Winter*, 38 Iowa, 471; *Lewis v. Curnutt*, 130 Iowa, 423; *Forney v. Remey*, 77 Iowa, 550; *McCartney v. Ridgway*, 160 Ill. 129 (43 N. E. 826, 32 L. R. A. 555); *Foreman v. Archer*, 130 Iowa, 55. In order, therefore, to ascertain the identity of the proposed grantees or beneficiaries to whom the trustee must convey, we must be governed by the provision of the trust deed itself.

II. Looking to the last clause of section 2 of the trust deed which we have quoted above, viz., "that said trustee execute a deed to the heirs of said Mary McCash in such shares as they would have received had the
2. SAME. said Mary McCash died owning the property in fee simple," Mrs. Derby contends that the trustee must convey to the persons who would have received the property if Mary McCash had owned the same in fee simple at the time of her death. She argues that this would carry the property to the residuary devisees of the mother's will. But the trust deed requires the trustee to convey to the "heirs," and not to the "devisees" of Mary McCash. The term "heirs" fixed the class of those who should take as grantees. The remainder of the clause fixed the extent of interest or share which each grantee should take. It amounted to a provision for equality of distribution as between her living children and the representatives of those deceased.

III. Was Grace McCash a beneficiary under the trust deed? Did the trust deed carry to her any beneficial interest in the remainder after the termination of her life estate?

3. SAME: wills: construction. Did the trust deed specify any condition or contingency whereby it should become the duty of the trustee to convey to Grace any interest in the

remainder? These queries all must be answered in the negative. By the terms of the trust deed the final grantees could be ascertained only on the death of Grace and the termination of her life estate. If she left issue, then these took the remainder of the fee. If she left no issue, and yet survived her mother (as she did), then the class of takers of the remainder became fixed as the "heirs" of the mother. Such heirs, however, would take not by descent from the mother, nor yet under the will of the mother, but by conveyance from the trustee in strict accord with the terms of the trust deed. By these terms such class could include only those who survived Grace. *Birdsall v. Birdsall*, 157 Iowa, —; *Jordon v. Hinkle*, 111 Iowa, 43. It follows, therefore, that the will of Grace McCash carried nothing to Mrs. Derby so far as the property in suit is concerned. Applying the provisions of the trust deed to the conceded facts as they existed at the time of the death of Grace, the plaintiff and Mrs. Derby are each entitled to one-fourth of the property as the only children of their mother surviving the daughter Grace, and the defendants Dayton and Bartscher are each entitled to one-fourth share as the only children, respectively, of the two deceased daughters.

This was the conclusion of the trial court, and its order is *Affirmed*.

STAPP and HENDRICK, Appellants, v. J. M. GODFREY,
Appellee.

Agency: COMMISSION CONTRACT: PLEADING: RECOVERY. Where an
1 agent seeks to recover compensation for negotiating an exchange of property, and alleges an express contract to pay a stipulated price for his services, he cannot recover on *quantum meruit*.

Same: MIDDLEMAN: RIGHT TO COMMISSIONS. An agent, in acting as
2 a middle man, simply undertakes to get the parties together, and not to negotiate for either of them; and when understandingly employed he may receive a commission from both, with or without the consent of the other.

Same: INSTRUCTION. Where the pleadings, in an action to recover
3 commissions for the exchange of property, are drawn wholly upon
the theory that defendant knew plaintiff was to receive compensation
from the other party, and not that plaintiff was simply
acting as a middleman for the sole purpose of bringing the parties
together, there was no necessity for an instruction defining middleman,
in the absence of a request.

Same: RIGHT TO COMMISSIONS: INSTRUCTIONS. If an agent is employed
4 simply to get the parties together, with no power to negotiate for either,
the law implies notice to the principal that he may receive a commission
from both; but if he is employed to find a purchaser or make a sale,
he cannot receive compensation from both without the consent of each;
and where the case was tried on the theory of actual knowledge by
defendant that plaintiff was to receive compensation also from the other
party, and the court submitted the case on that theory, plaintiff could
not complain that the court did not instruct on the theory of implied
notice.

Same: MIDDLEMAN. An agent employed by both parties to make an
5 exchange of properties, and who actually participates in the negotiations,
is not a middleman.

Same: PLEADINGS: BURDEN OF PROOF. Where the plaintiff alleged
6 an express contract for the payment of commissions, and in reply to
the defense that he had received compensation from the other party,
he alleged that defendant knew that he was expecting the same,
the burden was upon him to show that defendant had such knowledge
when he promised to pay plaintiff a commission.

Appeal from Keokuk District Court.—HON. B. W. PRESTON,
Judge.

TUESDAY, FEBRUARY 11, 1913.

ACTION to recover a commission for finding a purchaser of certain real estate belonging to defendant. Defendant denied that he authorized plaintiffs to find a purchaser, admitted that he executed a contract for exchange of properties with one Kaufman, and further averred that plaintiffs, without his knowledge or consent, obtained a commission from Kaufman for effectuating the exchange. Plaintiffs, in reply, admitted that they received a commission from Kaufman,

but averred that this was with the full knowledge of defendant and Kaufman. On these issues the case was tried to a jury, resulting in a verdict for defendant, and plaintiffs appeal.—*Affirmed*.

J. H. Wyllie, for appellants.

D. W. Hamilton, for appellee.

DEEMER, J.—The issues as made by the pleadings were: First. Did plaintiffs and defendant enter into an agreement whereby defendant was to allow plaintiffs a commission for the sale of his real estate? Second. Admitting that plaintiffs received a commission from the purchaser Kaufman, did defendant know of that fact before the sale was consummated? Third. If plaintiffs are entitled to recover, what is the measure of their recovery?

The verdict was general, and, as there was a conflict in the testimony upon each of the propositions involved, the case must be affirmed, unless it appears that errors were committed upon the trial which call for a reversal of the judgment entered upon the verdict. The errors argued relate to the instructions given by the trial court, and to its failure to give instructions relating to certain issues, although no requests were made by plaintiffs with reference thereto. As complaint is made of most of the instructions, we have set out the ones which are complained of, with others which tend to modify or explain them.

In the instruction stating the issues, the court quoted this part of the reply filed by plaintiffs: "The plaintiff admits that it received a commission from the said Kaufman, and says, further, that plaintiff was acting as a mere middleman in consummating the trade, or exchange of property, and that defendant expected to pay a commission as alleged in plaintiff's petition, and that plaintiff expected to receive such commission, and that defendant knew that plaintiff expected

to receive a commission from both parties, and that plaintiff was acting with the full knowledge and consent of both the said Kaufman and defendant." And this was followed by the main body of the charge, reading in this wise:

Under the issues thus presented, the burden of proof is upon the plaintiff to establish the material allegations of his petition by a preponderance of the evidence before he can recover, and it being admitted by the plaintiff that it received a commission from the other party to said trade, to wit, E. C. Kaufman, the burden is upon plaintiff to show in like manner—that is, by a preponderance of the evidence—that, before the contract between Kaufman and Godfrey was signed up, plaintiff or a member of the firm disclosed to the defendant Godfrey the fact that plaintiff firm was to receive a commission from Kaufman in the trade. The material allegations of plaintiff's petition are that there was a contract between plaintiff and defendant, and that the terms thereof were substantially as set out and claimed by the plaintiff, and that there was a performance thereof on plaintiff's part by bringing Kaufman and defendant together for negotiation for exchange of their properties, and that there is something due plaintiff from defendant by reason thereof. If you find these several matters so established by the evidence, and that the plaintiff firm, or a member thereof, disclosed to the defendant, before the signing of the contract between Kaufman and Godfrey, that Kaufman had listed his property with the plaintiff firm, and that plaintiff was to receive a commission from said Kaufman, as herein explained, then your verdict should be for plaintiff. If you fail to so find, then your verdict should be for defendant. . . . The defendant alleges in his answer that the plaintiff was to receive, and did receive, a commission in this same trade from Kaufman, and it is admitted by plaintiff that such is the fact. This being so, the plaintiff cannot recover herein, even though you find the contract between the plaintiff and defendant as claimed by plaintiff, unless the plaintiff firm or a member thereof disclosed to defendant that fact prior to the final consummation and signing of the contract between Kaufman and Godfrey. If you find from the evidence, and by a preponderance thereof, that plaintiff firm, or a member thereof, did so disclose such fact to defendant, and that the contract

was as claimed by plaintiff—that is, that plaintiff was to bring Godfrey and Kaufman together for negotiations as to the exchange of the property—and that the agreement between plaintiff and defendant was that defendant should pay \$1 per acre for such services, then your verdict should be for plaintiff. But, if you fail to so find, your verdict should be for the defendant. If you find plaintiff entitled to recover, the measure of his damages or recovery will be \$320, with interest at 6 per cent. from May 21, 1911, and, if you so find, you should compute the interest and return your verdict in one lump sum.

The last instruction was given on the theory that plaintiffs are entitled to recover either \$320, with interest, or nothing; and in this there was no error, for plaintiffs in their petition alleged an express contract to pay them \$1 per acre for finding a purchaser of defendant's three hundred and twenty acres of land and there could be no recovery on *quantum meruit*.

The chief complaint made of the instructions quoted is that the court did not define a middleman or instruct as to the law of the case in the event the jury found plaintiffs were what counsel call "middlemen." As we understand it, a middleman is one who acts as agent of both parties, and who sustains no such confidential relations to either as that he is bound to look after his interests. He is the agent of both, and merely brings the parties together in order that they may negotiate; he being under no duty of negotiating for either. *Synnott v. Shaughnessy*, 2 Hasb. (Idaho) 122, (7 Pac. 82). Strictly speaking, a middleman is one who simply undertakes to bring the parties together, and does not involve the duty of negotiating for either. He may contract for and receive a commission from both, for such an agreement is implied from the nature of the agency. *Stewart v. Mather*, 32 Wis. 344; *Hedden v. Shepherd*, 29 N. J. Law, 344; *Rupp v. Sampson*, 16 Gray (Mass.) 398, (77 Am. Dec. 416). If the agent is understandingly employed as a mere middleman to bring

1. AGENCY: commission contract: pleading: recovery.

2. SAME: middleman: right to commissions.

the parties together, he may receive a commission from both with or without the other's consent, provided it is simply his duty to bring the parties together. It is true that this thought is not specifically covered by the instructions given, and the reason for it doubtless was that no instruction to that effect was asked.

Plaintiffs in their petition allege that they entered into an oral agreement with defendant: "Whereby it was agreed by and between the plaintiff and defendant that said plaintiff was to use its efforts in procuring a party who would trade a stock of goods for said three hundred and twenty (320) acres of land; and, in consideration of said service, the said defendant agreed to pay to said plaintiff the sum of one dollar (\$1.00) per acre." These allegations do not show that plaintiffs were employed as mere middlemen, and the only reference thereto is found in plaintiffs' reply to meet the defense interposed by defendant to the effect that plaintiffs received a commission from the buyer without their knowledge and consent. The allegations of this reply were as follows: "That at the time of making the contract of employment, as alleged in plaintiff's petition, defendant was informed that said stock was listed with plaintiff, and was informed that plaintiff expected to obtain a commission if exchange was made. . . . He admits that he received a commission from the said E. C. Kaufman. For further reply plaintiff states that it was acting as a mere middleman in consummating the said trade or exchange of property, and that defendant expected to pay a commission as alleged in plaintiff's petition, and the plaintiffs expected to receive said commission, and that the defendant knew that plaintiff expected to receive a commission from both parties, and that plaintiff so acted with the full knowledge and consent of both the said E. C. Kaufman and the defendant herein." The reply was called forth in response to defendant's answer alleging that plaintiffs were not defendant's agents, and that they received a commission

from Kaufman. In so far as the reply departed from the allegations of the petition, it cannot be considered; but, if the allegations thereof be received, they proceed on the theory that defendant knew plaintiffs were to receive a commission from Kaufman, and not upon the ground that plaintiffs were mere middlemen. For this reason, the court did not err in the instructions given or in failing to instruct in the absence of specific request upon the theory that plaintiffs were mere middlemen.

It is familiar doctrine that a real estate broker cannot act as agent for both buyer and seller, and receive a commission from each, without the consent of both. But this consent may sometimes be inferred from the nature of the agency. If one be employed as a mere middleman without the power or duty of negotiating for either, the law will imply notice to the principal that the middleman may receive and collect a commission from each. But if an agent is employed to find a purchaser, or is to make a sale, he cannot recover a commission from both, without the consent of each; for, as has been well said, "a man cannot serve two masters." In either event, however, consent either express or implied, is necessary.

The case was tried on the theory that plaintiffs had to show actual knowledge on the part of defendant that plaintiffs were to receive a commission from Kaufman, and the instructions were based upon this notion, and of this plaintiffs are in no position to complain, for they asked no instructions whatever. As notice express or implied is necessary in either case, the trial court was not required, in the absence of specific request, to charge on the theory of implied notice.

Moreover, the testimony shows that plaintiffs actually participated in the negotiations leading up to the final exchange, and were at that time, so far as defendant knew, acting for him. They were, therefore, not middlemen. In *Casady v. Carraher*, 119 Iowa, 500, we said: "The plaintiff undertakes to excuse his conduct

4. SAME: right to commissions: instructions.

5. SAME: middleman.

on the ground that he was merely a middleman, engaged to bring the parties together, and, as such, was not bound to disclose his relations with one to the other. See *Rupp v. Sampson*, 16 Gray (Mass.) 398, (77 Am. Dec. 416); *Orton v. Scofield*, 61 Wis. 382 (21 N. W. 261). But, in order to occupy that position, he should have limited his exertions to such service. If, in addition thereto, the middleman assists either in effecting a trade, he becomes to that extent a partisan agent, and the obligation immediately devolves upon him to disclose his agency to the other. *Strawbridge v. Swan*, 43 Neb. 781, (62 N. W. 199); *Copeland v. Insurance Co.*, 6 Pick. (Mass.) 203; note to *Leathers v. Canfield*, 117 Mich. 277, (75 N. W. 612, 45 L. R. A. 51). No definite value was put on their property by either defendant or Coombs in listing with plaintiff, and he was not authorized by either to negotiate the trade. But his compensation, as he claims, was dependent on an exchange, and he admits having exerted himself to the utmost to bring about the deal; advising each, apart from the other, that the trade was a desirable one to make. Under these circumstances, he was more than a middleman, for he attempted to aid each in effecting the exchange for which he was instrumental in bringing them together. Loyalty to either principal required him to disclose his relations to the other. The agent cannot serve two principals without the intelligent consent of both, and, if he undertakes to do so, compensation cannot be recovered for services rendered. *Wilson v. Webster*, 88 Iowa, 514; *Lindt v. Brewing Co.*, 113 Iowa, 200; *Bell v. McConnell*, 37 Ohio St. 396, (41 Am. Rep. 528); *Leathers v. Canfield*, 117 Mich. 277, (75 N. W. 612, 45 L. R. A. 33), and valuable note; *Rice v. Wood*, 113 Mass. 133, (18 Am. Rep. 459). Even with such consent, the utmost good faith toward each principal is exacted, and, unless each may be honestly served, the agency should be promptly terminated. *Morey v. Laird*, 108 Iowa, 670. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation

in which he may be tempted by his own private interest to disregard that of his principal. 'This doctrine,' in the words of another, 'has its foundation not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.' Mechem, Agency, section 455. As both parties knew plaintiff had not seen the properties exchanged, and as no fact appears to have been misrepresented by him, nothing was in the way of acting for both, save the concealment of his relation to the defendant from Coombs. Up to the time the agreement was dictated, then, plaintiff was guilty of duplicity which would defeat recovery.'" See, also, *Scribner v. Collar*, 40 Mich. 375, (29 Am. Rep. 541).

Under the admissions made in the pleadings, the burden was properly placed upon plaintiffs to show that defendant knew when he made his promise to pay a commission, if he made one, that plaintiffs were expecting a commission from Kaufman. Nothing to the contrary is announced in *Redmond v. Henke*, 137 Iowa, 228. In that case there was an issue as to whether or not plaintiff received a commission from the purchaser; while here plaintiffs in their reply admitted that fact, but sought a verdict by pleading knowledge on the part of defendant that they were to have a commission from the purchaser. As they were required, in the face of their admission, to plead the fact of knowledge, the burden was upon them to prove it. *Lindt v. Brewing Co.*, 113 Iowa, 200; *Wilson v. Webster*, 88 Iowa, 514.

No error appears, and the judgment must be, and it is *Affirmed*.

PRESTON, J., taking no part.

6. SAME: plead-
ings: burden
of proof.

THE CITY OF OTTUMWA, IOWA, Appellant, v. ALBERT SCOTT.

Municipal corporations: POLICE COURTS: JURISDICTION: STATUTES.

Police courts, in cities having no superior courts, have jurisdiction of a civil action to recover a tax which has not been paid, in violation of an ordinance requiring certain citizens to perform labor upon the streets, or to pay a stated sum in lieu thereof.

Appeal from Wapello District Court.—HON. FRANK W. EICHELBERGER, Judge.

TUESDAY, FEBRUARY 11, 1913.

ACTION to recover poll tax was begun in the police court of the city of Ottumwa. The defendant moved that the cause be dismissed, for that the court was without jurisdiction. The motion was sustained, and, on writ of error being sued out to the district court, the ruling was affirmed. The city of Ottumwa appeals.—*Reversed.*

W. D. Tisdale, for appellant.

No appearance for appellee.

LADD, J.—The city of Ottumwa enacted an ordinance, in pursuance of sections 891 and 892 of the Code, requiring every able-bodied resident of the city between twenty-one and forty-five years of age to perform two days' labor upon the streets, on three days' notice in writing, or to pay, in lieu thereof, the sum of \$1.50 for each of such day's labor, and that upon failure to pay within a specified time recovery might be had in the police court of the city. The petition alleged facts entitling the city to recover \$3 unpaid poll tax

from defendant, unless the police court was without jurisdiction to entertain the suit. To determine this question the statutes bearing thereon must be examined. All cities of the first class, without a superior court, have a police court. Section 688 of the Code declares that it "shall always be open for the dispatch of business. It shall have, in all criminal cases, the powers and jurisdiction of justices of the peace and the jurisdiction of a mayor's court in the case of a violation of a city ordinance." Section 691 reads in part: "The mayor shall have exclusive jurisdiction of all actions or prosecutions for violations of the city or town ordinances. He shall also have, in criminal matters, the jurisdiction of a justice of the peace, coextensive with the county, and, in civil cases, the same jurisdiction within the city or town as a justice of the peace has within the township. None of the jurisdiction referred to in this section shall be exercised by the mayors in cities having a superior or police court."

Section 692 provides that "the proceedings before a mayor or a police court shall be, as far as applicable, in accordance with the law regulating similar proceedings before a justice of the peace, unless otherwise provided; but there shall be no change of venue in actions or prosecutions under ordinances, and the trial shall be by the court without a jury, except on appeal; appeals and writs of error shall be taken from the mayor or the police court in the same time and manner, and subject to the same restrictions." Section 892 of the Code Supplement provides that, "in case of failure to pay said sum of money in lieu of said labor, together with such forfeit, to the supervisor of highways, street commissioner or other officer of said corporation authorized to receive the same within ten days from the expiration of the time fixed for the performance of such labor, said corporation may recover the same by action brought in the name of such city or town before the mayor of said corporation, or before any justice of the peace in the proper township."

The section previously quoted confers jurisdiction of the

mayor's court on the police court, if the action may be said to be based on a violation of an ordinance of the city. The exaction of the poll tax was authorized by section 891 of the Code Supplement, which declares, in part, that "any city or town shall have power to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years, between the first day of January and the first day of November of each year, either by themselves or satisfactory substitute, shall perform two days' labor of eight hours each upon the streets, avenues, alleys, highways or public grounds within such corporation, at such times and places as the proper officer may direct, upon three days' notice in writing given, or pay in lieu thereof in money a sum to be fixed by such council, not exceeding one and one-half dollars for each of such day's labor. For each day's failure to attend and perform the labor, or pay said sum of money, as required, at the time and place specified, unless excused by the supervisor of highways or street commissioner, the delinquent shall forfeit and pay the sum of two dollars, not exceeding four dollars in all."

Matters relating to exceptions are not involved, and need not be set out. Only upon the enactment of an ordinance so providing then may residents of the city, as described, be required to perform labor, or pay in lieu thereof; and if such residents fail to comply therewith this constitutes a violation of the ordinance. An ordinance, and not the statute, required the labor to be performed or the money paid, and if neither was done it was violated; and by the language of the statute jurisdiction of actions for the violation of ordinances is conferred on the police court in cities like Ottumwa, having no superior court. No distinction is drawn between causes of a criminal nature and civil actions. Indeed, the language of section 691 of the Code, in including "actions" as well as "prosecutions" for violations of ordinances, plainly contemplates both civil and criminal actions, as does the similar use of these words in section 692 of the Code; and section 688

is quite as broad in conferring on the police court the jurisdiction of the mayor in the matter of violations of ordinances. See *City of Lansing v. Railway*, 85 Iowa, 215.

The manifest design of the statutes is to give the police court precisely the same jurisdiction with respect to the violation of city ordinances as is conferred on mayors of cities and towns; and, as recovery for violation of an ordinance exacting the payment of a poll tax is authorized before such mayor by section 892 of the Code Supplement, the action therefore may also be maintained in the police courts of cities of the first class. That section 680 of the Code limited municipalities to the imposition of fines and imprisonment for the enforcement of obedience to ordinances did not obviate power subsequently being conferred by the Legislature to enforce such obedience by civil action, as was done by section 892 of the Code Supplement.

We are of opinion that the police court had jurisdiction of the cause of action, and the court erred in holding otherwise.—*Reversed*.

F. M. DAVIS, Appellee, v. HARVEY RITCHEY, Appellant.

Practice: CONTINUANCE OF CAUSE: DISCRETION. The trial court has
1 a discretion in the matter of granting a continuance; and where the motion for continuance was for the purpose of obtaining testimony from a foreign state, and the pleadings to which it was applicable had been on file for some time, and there was no showing why the desired evidence had not been taken, a denial of the motion was not an abuse of such discretion.

Judgments: FORMER ADJUDICATION. A former decree quieting the
2 title to property in the defendant's father, and a subsequent judgment against defendant in his action to set the decree aside, are conclusive against his claim to the property in subsequent litigation over the title to the property.

Evidence: COMMUNICATIONS WITH A DECEDENT. The defendant in an
3 action to quiet title and for an injunction was incompetent to testify to an oral agreement between himself and a deceased person,

one of the grantees to whom the land in controversy was conveyed, and of whom plaintiff was the survivor, where the plaintiff did not testify concerning the agreement.

Appeal from Adams District Court.—HON. H. K. EVANS,
Judge.

WEDNESDAY, FEBRUARY 12, 1913.

SURT in equity to quiet title and for injunction. There was a trial to the court, and a decree for plaintiff. Defendant appeals.—*Affirmed.*

J. H. Ritchey, for appellant.

Stanley & Stanley, for appellee.

PRESTON, J.—The pleadings are somewhat voluminous, covering twelve pages of the abstract, but, stated briefly, plaintiff in his petition, amendment, and reply claims that he is the owner of lot 128, in Corning, Iowa, and asking that defendant be enjoined from interfering with his possession thereof, and claims that he has been in possession under color of title for more than ten years, except that for the last few years defendant has by force and threats attempted to hold possession against plaintiff. He also pleads a former adjudication against the defendant. The defendant's claim is substantially that he denies that plaintiff is the owner, but admits that plaintiff has an apparent title thereto, as shown by the records, and alleges that about 1899 he, defendant, made a parol contract of purchase with A. L. Wells, one of the parties having the legal title to said lot, and that he has had possession under claim of right for more than ten years, that such possession has been continuous, open, and adverse, and that he and his ancestors have been in possession under claim of right for more than forty years, all of which is denied by the plaintiff.

I. The first matter complained of by appellant is that the court erred in overruling his motion for a continuance. He says he was taken by surprise by the filing of plaintiff's

1. **PRACTICE:**
continuance of
cause: discre-
tion. amendment to petition, and that he should have been given an opportunity to obtain the testimony of the registrar of the land office in Nebraska to show that D. C. Ritchey, plaintiff's grantor, entered a homestead in Nebraska about 1899, and proved up on the same about 1904. Plaintiff's amendment was filed May 2d. Defendant's answer was filed May 24th, and plaintiff's reply October 4th. The motion for continuance was filed October 16th, and the trial had October 30th, all in 1911. The plaintiff as a witness admitted that said Ritchey was in Nebraska and took up a homestead, and that he was absent a part of the time each year for two or three years. Several months elapsed before the trial after the filing of the amendment to petition, and nearly a month after the filing of plaintiff's reply. The defendant could have in that time obtained a certified copy of the records as to these matters, at least there is no showing why he could not have done so, or taken the deposition of the land office officials by leave of court, even in term time. The trial court did not abuse its discretion in this matter.

II. The record shows that on May 20, 1896, a decree was rendered by the district court of Adams county quieting the title to the lot in question in one Daniel Ritchey, who was defendant's father. That action was brought

2. **JUDGMENTS:**
former adjudi-
cation. by said Daniel, and against the executor of the estate of one D. N. Smith. Martha Ritchey was defendant's mother, and she died in 1894. In June, 1896, appellant and his sisters brought an action to set aside the decree of May 20th, claiming that D. N. Smith had agreed in parol to convey the lot to said Martha, and that as heirs of Martha Ritchey they were the owners, and alleging that the first decree was obtained by fraud. The decision of the court rendered January 15, 1897, was against appellant.

September 30, 1897, appellant filed a motion for a new trial of that action on the ground of newly discovered evidence, which motion was denied in January, 1898, and an appeal taken to this court, which affirmed the ruling in May, 1899. June 6, 1896, Daniel Ritchey, by warranty deed, conveyed to F. M. Davis and A. L. Wells. On the same day Davis and Wells executed a writing to Daniel Ritchey, reciting items of indebtedness of said Ritchey to them, and giving him the privilege of paying the same, and agreed to convey back on such payment. Daniel never paid, but afterwards executed a quitclaim deed to F. M. Davis and A. L. Wells. In 1901 A. L. Wells conveyed his interest to Arthur R. Wells, who conveyed to plaintiff in 1910. It will be seen that a number of adjudications have been had against defendant, and plaintiff's title and right of possession is complete, and he should prevail in this action, unless defendant has made out his claim that in 1899 he made a parol contract of purchase with A. L. Wells, one of the then owners, and that by reason thereof, and his alleged possession for more than ten years, he has title under a claim of right. The lot in question is unimproved, though defendant built a sidewalk after this suit was brought. He paid the taxes a part of the time before they were due. There is some confusion in the record as to whether or not there was a small stable on the lot. A concession recites that no part of the building was on the lot, and we take it this refers to the stable. Plaintiff paid the taxes a part of the time, claimed to own the lot and possession thereof, attempted to improve it, but was prevented by defendant's threat to shoot.

Defendant's claim as to the alleged parol agreement with Wells rests upon his testimony alone, which is set out in the record, but was taken subject to the objection that the witness and his testimony was incompetent under section 4604 of the Code. Wells died in 1901. Defendant's evidence is unreasonable and improbable. We shall not further refer to it because

3. EVIDENCE:
communications with a
decendent.

he was incompetent to testify. As we understand it, Davis and Wells were partners, though they were named separately in the deeds. In either event F. M. Davis, the plaintiff herein, was the survivor of Wells, and defendant could not testify against him as to personal transactions and communications. Davis did not testify as to the alleged parol agreement between Wells and Ritchey, so that defendant would not come within the exception in section 4604, as he contends. This question as to the alleged parol contract was raised by defendant in his answer, and as to this the defendant testified before the testimony of Davis was given. The decree of the district court was right.

It ought to be, and it is, *Affirmed*.

JOSEPH J. FUCHS, Appellant, v. THE CITY OF CEDAR RAPIDS,
IOWA, LOUIS ROTH, Mayor, L. J. STOREY, City Clerk,
Appellees.

Municipal corporations: STREETS: REPAIR: ASSESSMENT OF COST.

A city has no authority to assess the cost of merely repairing a street against abutting property; but to bring the city within the statute and authorize an assessment for the cost, it must appear that the work proposed constitutes a reconstruction of the street improvement, as distinguished from a repair of the original construction. In the instant case the contemplated street improvement was a work of reconstruction, rather than of repair, and the city was authorized to assess the cost against the abutting property.

Appeal from Superior Court of Cedar Rapids.—HON. C. B. ROBBINS, Judge.

WEDNESDAY, FEBRUARY 12, 1913.

ACTION to enjoin assessment for street improvements. Decree for defendant. Plaintiff appeals.—*Affirmed*.

Jamison, Smyth & Hahn, for appellant.

Wm. Chamberlain, City Solicitor, *C. F. Luberger*, Assistant City Solicitor, and *Don Barnes*, for appellees.

GAYNOR, J.—On the 4th day of October, 1912, the plaintiff filed his petition in the superior court of Cedar Rapids, alleging, among other things, that on the 16th day of August, 1912, the city council of Cedar Rapids passed a resolution of necessity declaring that, for resurfacing with sheet asphalt certain streets and avenues, a public necessity existed within the city, among which streets and alleys was Second avenue east from Fourteenth street to Seventeenth street; the resurfacing to consist of removing the present asphalt wearing surface and binder course from a five-inch concrete base, which now lies in said street, said concrete base being a part of the present asphalt paving existing upon said avenue, and resurfacing the said five-inch concrete base with a one-half inch binder course and one and one-half inches wearing surface of sheet asphalt; that the said resolution of necessity further provided that the cost of the work aforesaid should be assessed against the property abutting upon said improvement; that thereafter, and in pursuance of said resolution of necessity, the city council passed a resolution ordering that said street be so resurfaced, and that the cost of the same be assessed as a special tax against the property abutting thereon; that thereafter the city council ordered and directed the city clerk to advertise for proposal and bids for the construction of the same; that the city clerk did so advertise; that thereafter, in due form, the city council passed a resolution awarding said contract to the Ford Paving Company, and directed the mayor and city clerk to enter into a contract with said company for the construction of said improvements, to be paid for as aforesaid by such special assessment, and plaintiff alleges that, unless restrained by the court, such contract will be entered into, and the city bound thereby; that

the plaintiff is the owner of lots lying upon Second avenue between the points aforesaid, and abutting upon the improvements so ordered to be made, and will be liable to special assessment for said improvements. Plaintiff further says that his lot aforesaid was assessed with its proportionate share of the original cost of the original construction of said pavement now intended to be resurfaced, as aforesaid, and that said assessment was duly paid; that, since said pavement was originally constructed, the city has made no repairs thereon, but suffered and permitted the wearing surface to become out of repair, and out of this grows the necessity for resurfacing. The plaintiff claims that the work aforesaid does not constitute a reconstruction of said pavement, as contemplated by the statute relating to special assessments, but a mere repair; and, as such, the cost thereof is not assessable against the abutting property. Therefore the plaintiff prays for a temporary writ enjoining and restraining the defendants from entering into, or signing, any contract purporting to bind the city to cause said work to be done and the cost thereof to be assessed against the abutting property, and especially against the property of this plaintiff; and that, upon final hearing, the injunction be made perpetual.

The defendants admit each and every allegation of plaintiff's petition, but allege, in addition to said facts, that the company which originally constructed said pavement did, in the year 1908, make extensive repairs upon said pavement, and allege that said pavement, originally put in, was constructed in the year 1900 and 1901, and has been in continuous use since that time. Defendants, however, deny the legal conclusions of the plaintiff wherein the plaintiff says that the contemplated improvement complained of in this suit is not a reconstruction of said pavement, but constitutes merely a repair thereon.

This cause was tried to the court upon the pleadings, and upon the following agreed statement of facts which, so far as material to this controversy, under the issues, are as follows:

That that portion of Second avenue upon which plaintiff's lot abuts was paved in 1901, with an asphalt pavement, consisting of a four-inch foundation of concrete with a one-inch binder course composed of crushed rock and asphalt cement, and a two-inch wearing surface of sheet asphalt; that said original pavement was constructed under a contract with one R. F. Conway Company, and, upon its completion, was accepted by the city, and special assessments were levied against the abutting property, including the lot now owned by the plaintiff, to defray the cost of said improvement, and the plaintiff and his grantors have paid said special assessment so made; that the city of Cedar Rapids has never made any repairs upon said pavement, but that in 1908 the Conway Company, having a bond to so do, did make extensive repairs thereon, patching and resurfacing all places in said pavement where the wearing surface had worn through; that the bond of the said Conway Company required it to make repairs required for the period of seven years; that the sheet asphalt wearing surface upon said pavement, at the present time, is so disintegrated, decayed, and worn out as to render the pavement unfit for public travel; that the proposed improvement now in contemplation, at which this injunction is aimed, is as follows: The wearing surface and binder course now remaining upon the original concrete base of four inches are to be fully removed, taken away, and a new surface to be constructed upon the said original concrete base, to consist of one-inch binder course to be composed of crushed stone and asphaltic cement, and one and one-half inch surface of sheet asphalt, all to be done according to the plans and specifications—that it is the purpose and intention of the defendant city to levy against the abutting property, including the property of this plaintiff, the cost of the construction of said improvement, and the defendant city will so cause said improvement to be constructed, and assessments made, as aforesaid, against the property of this plaintiff, for the improvement aforesaid, unless restrained by this court.

The only portion of the plans and specifications material to be considered reads as follows:

In removing the old pavement, care must be taken not to injure the foundation. All places in the surface of the

foundation, more than two and one-half inches below the finished grade of the pavement, shall be filled with new concrete mixed one part Portland cement to four parts clean river sand. Where old concrete is too high, it shall be cut down to two and one-half inches below the finished grade of the pavement.

It will be noticed from the foregoing statements that there is no fact controversy here, and that but one question is presented, and that is: Whether or not the proposed improvements or contemplated work constitutes a reconstruction, such as is provided for and authorized in section 792 of the Code, or whether it constitutes a repair merely of the pavement, as originally constructed, and this is the only question here presented to this court for its determination.

The statute provides (section 792) :

Cities shall have power to improve any street, highway, avenue or alley by grading, parking, curbing, paving, graveling, macadamizing and guttering the same, or any part thereof, and to provide for the making and reconstruction of such street improvements, and to assess the cost on abutting property as provided in this chapter.

Upon the hearing in the court below, plaintiff's petition was dismissed; the court having found that the work contemplated constituted a reconstruction of the pavement, as contemplated by the statute, and came within the provisions of the statute authorizing an assessment, for the costs thereof, against abutting property. It will be noticed that this statute does not authorize the city to assess the cost of mere repairs against abutting property. To bring the city within the provisions of this statute, and to authorize the city to assess, against abutting property owners, the cost of the contemplated improvements, it must appear that the work proposed constitutes a reconstruction of such street improvements, as distinguished from a repair of the original construction.

To "repair" presupposes the existence of the thing to

be repaired; thus we say the thing needs repairing; the thing is out of repair; and so, when we speak of repairs, we assume that the thing to be repaired is in existence, and the word "repair" contemplates an existing structure or thing which has become imperfect by reason of the action of the elements, or otherwise; and, when we repair, we restore to a sound or good state, after decay, waste, injury, or partial destruction, the existing structure or thing which needs to be restored to its original condition, or, in other words, we supply, in the original existing structure, that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near as may be.

Reconstruction presupposes the nonexistence of the thing to be reconstructed, as an entity; that the thing, before existing, has lost its entity; and "reconstruction" is defined as follows: "To construct again; to rebuild; to restore again as an entity the thing which was lost or destroyed"—and it is apparent that the Legislature meant by the word "reconstruct" to rebuild (that is, to construct again the thing which, as an entity, has been lost or destroyed); and the fact that in reconstruction some of the material or parts which entered into the composition of the original entity are used does not deprive it of its designation of a reconstructed thing. To illustrate: If a house is completely torn down, and its entity as a house destroyed, the fact that no material was used in rebuilding, except what had formerly been in the building, as originally constructed, would not justify one in saying, wishing to speak correctly, that the house was repaired, but rather that it was rebuilt, or reconstructed.

Let us turn now to the stipulation made by the parties, hereinbefore referred to, and see how this street was originally constructed, and what its condition was at the time of the proposed improvement, and what improvements were proposed to be made on said street by the city. As to the first proposition, it appears that in 1901 the street in front of plaintiff's property was paved with asphalt, and thereafter known as

an asphalt pavement; that it consisted of a four-inch foundation of concrete, with a one-inch binder course composed of crushed rock and asphaltic cement, and on top thereof a two-inch wearing surface of sheet asphalt. Second, that the sheet asphalt wearing surface upon said pavement, at the present time, is so disintegrated, decayed, and worn out as to render the pavement unfit for public travel. Third, that the wearing surface and binder course now remaining upon the original concrete base of four inches are to be fully removed, and a new surface, to be constructed upon the original concrete base, to consist of one-inch binder course to be composed of crushed stone and asphaltic cement, and a one and one-half-inch surface of sheet asphalt. The necessity for the work was determined by the city, and with this determination we have nothing to do. The question, therefore, is, Do the facts so stipulated by the parties show such a destruction of the asphalt pavement that the contemplated improvement constitutes a reconstruction or simply a repair thereof?

We hold that these facts show a destruction of the original pavement as an entity; that the work contemplated involves a reconstruction of the same upon the foundation upon which the original structure rested. And we hold this for the following reasons: First. The city had a right to determine the public necessity for this work; that it was a public necessity; and they did so determine. Second. The city had a right to determine how this public necessity should be met, and how the work should be done to meet this necessity. Third. That the work contemplated involves the destruction of the entire original structure except the foundation. Fourth. That the contemplated improvement is a new and original structure upon the old foundation. Fifth. That the work of rebuilding on the old foundation is a reconstruction of the asphalt pavement heretofore existing. And we further hold that, being a reconstruction, the cost thereof was properly assessable against the abutting property.

Now let us see what the authorities have to say on this

proposition. You take the case of *Robertson v. City of Omaha*, found in 55 Neb. 718 (76 N. W. 442, 44 L. R. A. 534). In that case the street was paved with cedar block laid on a concrete foundation; that the pavement had become in such a dilapidated and worthless condition that it was unfit for travel; and an ordinance was passed declaring the necessity existed—that is, a public necessity—for repaving that portion of the street, and thereafter another ordinance was passed for repaving said street by removing the cedar blocks from the concrete paving, and replacing them with vitrified brick, and the contract was duly let to so do, which work was fully performed, and the improvements so made accepted by the city. And thereafter a special assessment was made to meet the cost of said improvement, and a suit was instituted to prevent the levy of said special taxes, and it was urged in that case that the work was not a repavement of the street, but was merely a repair of an existing pavement, and that the city itself was liable therefor, and that it possessed no authority to impose a special assessment against the real estate of the plaintiff to pay the same. The court says: “That this contention is grounded upon the single fact that the concrete foundation of the former cedar block pavement was utilized in making the improvement in controversy. The entire wearing surface of wood of the old pavement was removed, and the mere using of the old base of concrete did not constitute a work of ordinary repair, under and within the meaning and contemplation of the statute.” The statute referred to in this decision, after authorizing the levy and collection of special taxes and assessments upon the lots or pieces of ground abutting upon, or adjacent to, any street to defray the costs and expenses of improving and repairing said street, declares: “That the above provision shall not apply to ordinary repair of streets which shall be paid out of the general fund of the city.” See, also, *Jones v. Plummer*, 137 Mo. App. 337 (118 S. W. 109). See, also, *Field v. City of Chicago*, 198 Ill. 224 (64 N. E. 840); also *McCaffrey v. City of*

Omaha, 72 Neb. 583 (101 N. W. 251). See, also, *Barber Asphalt Paving Co. v. Muchenberger*, 105 Mo. App. 47 (78 S. W. 280), wherein it is held: "In performing a contract for a street improvement, the old asphaltum was removed, and the old concrete base was replaced by new material, where necessary. Where no concrete existed, new concrete was used not more than six inches in depth, and the finished surface made to conform to a plane parallel with, and three inches below, the finished surface of the pavement. Wherever the earth where the new concrete was used was soft and spongy, it was dug up and repaired. Wherever the concrete base then in place was below a point parallel to three inches below the finished surface of the pavement, new concrete was laid on the old so as to bring its surface up to such parallel; and, wherever such base was above such point, it was cut down to the same parallel. In addition, a binder course of bituminous concrete, one and one-half inches thick, composed of clean and broken stone, was laid on the concrete base, and on this foundation a compressed asphalt wearing surface one and one-half inches thick was placed." It was held that the work so done was not repairs; that it was not an ordinary repair of the street.

As bearing upon the question as to whether or not the contemplated improvement constituted a reconstruction, and not a repair, we submit the case of *Bush v. City of Peoria*, 215 Ill. 515 (74 N. E. 797). This case was an appeal from a judgment entered in the county court of Peoria county confirming a special assessment levied under the authority of an ordinance of the city for the improvement of a portion of Moss avenue, in that city, to be paid for by special assessment on the property benefited. The court in that opinion said: "But a single question is presented by the record, and that is, Does the ordinance provide for a local improvement, or only for the repair and maintenance of a local improvement previously made at the expense of the owners of the property abutting thereon?" It appears that in 1891

this avenue was graded, curbed, and paved at the expense of the owners of abutting property; that the pavement consisted of a concrete base five inches in thickness, upon which were laid a binder course and a wearing surface of asphalt. The ordinance under which this work was attempted provided: "That the old asphalt pavement, surface coat and cushion coat and refuse, down to the concrete foundation lying thereunder, be entirely removed, and a new asphalt pavement two and one-half inches thick consisting of a binder course one and one-fourth inches thick, and a wearing surface one and one-fourth inches thick, be laid in the place of said old asphalt pavement and refuse, and that the old concrete foundation be the foundation for the new asphalt pavement." The court in deciding this case said: "A question of fact is presented by the record, and that is whether the improvement ordered to be made is merely an ordinary repair of the avenue, or whether the work is that of reconstruction or rebuilding"—and the court said: "We find, in the record, evidence showing that the pavement was full of holes in the surface material; that the asphaltum was worn down from its original thickness of two and one-half inches to one-half inch in some places, and to one inch in other places, making the surface of the roadway uneven; that it was cracked in many places by age; that the asphaltum had disintegrated in many different areas, both in the wearing surface and the binder course, from which holes and breaks have extended through to the concrete foundation. The court further says that it was within the scope and power possessed by the city to determine whether it was practicable to maintain the street by repairing, or whether a new pavement was required. The fact that the foundation on which the existing pavement had been laid was to be availed of as the foundation for the asphalt surface of the new pavement did not make the work one of repair only. If the old foundation would serve as a sound and substantial base on which to rest the new asphaltum surfacing, there is no reason why the same should be excavated and de-

stroyed, instead of being used in putting down the new pavement on the street." See *Farraher v. City of Keokuk*, 111 Iowa, 310.

On the whole record, we think the judgment of the court was right, and should be affirmed; therefore it is *Affirmed*.

ELMIRA BRIDGES, et al., Appellees, v. INCORPORATED TOWN OF GRAND VIEW, et al., Appellants.

Boundaries: STREET LINES: CHANGE: BURDEN OF PROOF. Where a
1 street line was conceded to be lost and was without visible monuments, and the abutting owner had held the undisputed possession up to the line claimed by him for a long series of years, which line corresponded with other lot lines in the direction in which it extended, the burden was upon the town, in an action to enjoin a change in the line, to show that the boundary as claimed by the abutting owner was incorrect.

Same: ADVERSE POSSESSION: ESTOPPEL. While an abutting owner
2 cannot by limitations acquire part of the street adversely to the municipality, still the municipality may estop itself by the acts of its officers and citizens from claiming that the street extends beyond a given line, although the same may not be the true line.

Same: CHANGE OF BOUNDARY: EVIDENCE. In this action by an abut-
3 ting owner to restrain the town from changing the line of the street, the evidence is reviewed and held insufficient to show that the line claimed by plaintiff was not the true line.

Same: ESTOPPEL. Acquiescence by a municipality for a long series
4 of years in the erection and maintenance of houses, sidewalks, fences and the general improvement of abutting property with respect to a given line corresponding to a similar line of an adjoining block, and the removal of such part of the improvements as would permit the establishment of the line as contended for by the city would render the premises unsightly, and in fact destroy and leave a portion of the improvements in the street, would estop the city from establishing another line as the true line.

Appeal from Louisa District Court.—HON. JAMES D. SMYTH,
Judge.

WEDNESDAY, FEBRUARY 12, 1913.

THIS is a controversy over the street line at the east end of lots, 1, 2, 3, 4 and 5, in block 22, Springer's addition to the town of Grand View, in Louisa county. These lots front on Market street, and occupy about one-half the block, lying between Vermont and Monroe streets in said town. Defendants had served notice upon plaintiffs to tear up and remove a sidewalk and fence along the front of these lots within twenty days from the giving of the notice; and plaintiffs brought this action to restrain the said defendants from interfering with the walk or the fences, or from changing the line between Market street and the lots before mentioned. Defendants claimed that the improvements were in the street and constituted a nuisance and an obstruction, which they were in duty bound to remove. On the issues joined the case was tried to the court, resulting in a decree granting plaintiffs part of the relief claimed, but fixing the line at a point intermediate between the lines claimed by the respective parties. Defendants alone appeal.—*Affirmed.*

H. O. Weaver and F. M. Molsberry, for appellants.

C. A. Carpenter and Oscar Hale, for appellees.

DEEMER, J.—Plaintiffs claim to have occupied up to a certain line between their lots and the street for many years; that this is the true line originally run in marking out Springer's addition upon the ground; that they have title by reason of adverse possession; and that, in any event, defendants are estopped from claiming that the line which they now insist upon as the true one is not the one originally established, because with the knowledge of the town and its officials they have laid sidewalks, built fences, improved their properties, and located their houses with reference to the line claimed by them to be the true one, and that, if the city is now permitted

to change it, it will result in great and irreparable injury. On the other hand, defendants insist that another line is the true one; that whatever use plaintiffs made of the town's property was permissive, and could not in any event be adverse as against the town; and that there is no estoppel for the reason that plaintiffs knew, or should have known, that the line claimed by them was not the true one; that they made their improvements subject at all times to the demand of the city; that they should vacate that part of the property which was in the street, and that, in any event, plaintiffs did no more than erect temporary fences, put out sidewalks and make slight and temporary repairs upon their property.

I. The first question which arises in all cases of this character is, Where is the true line? That is to say, where is the line which was run by the surveyor, and marked out

upon the ground? It is conceded by both parties that this line has been lost, and that there are now no known or visible monuments upon the ground. Plaintiffs, however, have an advantage here because they show possession to a given line unopposed and uncontested for a long series of years, and this line, in so far as disclosed by the record, corresponds with other lines farther north, when projected in that direction. So that under the conceded facts the burden is upon the defendants of showing that the line now claimed by plaintiffs or rather the line established by the trial court is not the correct one, and this they must do by a preponderance of competent testimony.

Passing that point, and conceding, as we must, that plaintiffs could not gain title to any part of the street by adverse possession against the town, for the reason that under our

holdings, the statute of limitations will not run against a town in any matter affecting its governmental powers (see *Quinn v. Baage*, 138 Iowa, 426; *McClenehan v. Town of Jesup*, 144 Iowa, 352, we, nevertheless, have the issue of estoppel; for, while the

1. BOUNDARIES:
street lines:
change: bur-
den of proof.

2. SAME: ad-
verse pos-
session: estoppel.

statute of limitations may not run against a town, it may, by the conduct of its citizens and of its officers, estop itself from claiming beyond a given line, although another may be, in fact, the true one according to the plat. This doctrine has been placed sometimes upon the theory that the town did not accept the grant tendered it by the owner of the platted property to any greater width than it assumed control over, and sometimes upon the ground that one may not stand by and see valuable improvements made upon his property, on a claim by the one who makes them that they are on his own property, without having his mouth closed from asserting that the improvements were upon his, the owner's property, and that he will tear them down. Where the doctrine is based wholly on the theory of estoppel by reason of the making of valuable improvements, which will be destroyed or injured in case they are torn down or removed, the element of time does not figure after the improvements are in fact completed upon property which is claimed as of right. Notwithstanding some dispute between counsel as to the proper rules for such cases, the foregoing are well established by authority. See *Corey v. City of Ft. Dodge*, 118 Iowa, 742; *Mt. Vernon v. Young*, 124 Iowa, 517; *Johnson v. City*, 153 Iowa, 493; *Sutton v. Mentzer*, 154 Iowa, 1; *McElroy v. Hite*, 154 Iowa, 453; *Eldora v. Edgington*, 130 Iowa, 151; *Sioux City v. Railroad Co.*, 129 Iowa, 694; *Brown v. City*, 117 Iowa, 302; *Biglow v. Ritter*, 131 Iowa, 213; *Quinn v. Baage*, 138 Iowa, 426; *Baker v. Railroad Co.*, 154 Iowa, 228; *McClenahan v. Jesup*, 144 Iowa, 352. While possession may not always amount "to nine points in the law," uninterrupted, undisputed, and unchallenged possession of a strip of ground abutting upon a street for a long period of years, followed by the making of improvements thereon, with reference to a given line, casts the burden upon a town or city of showing that the line thus claimed is not the true one. As said in *Mt. Vernon v. Young*, 124 Iowa, 517, "Where ground has been improved and ornamented with trees and shrubbery, and used as private property within the sight

and with the knowledge of the town and its officers, and without objection or remonstrance on their part, for the period of an average lifetime, before dispossessing the citizen of such property, the public right thereto must be established by clear and unequivocal testimony." So that the burden is upon the town of showing in the first instance that the line which plaintiffs claim is the true one is not the one located upon the ground at the time the original plat of the addition was made.

The town of Grand View was platted in July of the year 1841. By this plat the lots were sixty by one hundred and forty-two feet; and the alleys were sixteen and one-half feet wide. Market street was shown on the plat to be sixty-six feet wide. This plat was on the S. W. $\frac{1}{4}$ of section 22, in township 75, range 3 W., but the record does not show which part of the quarter section was covered by the plat. Springer's addition to the town was platted June 7, 1843, and a part of it overlapped the original town plat, but the record does not show in what section, township, or range the addition was to be found. It does show that the lots were sixty feet in width by one hundred and forty-two in depth, that the alleys were sixteen feet wide, and the streets from sixty-six to seventy-five feet in width; Market street being sixty-six feet. There is nothing whereby to locate the plat according to lines or corners, except a reference to the original plat of the town, and that contains no definite location. The original plat showed a variation of the streets from the true meridian line of seven degrees east. Plaintiff Hidelbaugh owns lots 1 and 2, and his co-plaintiff, Bridges, owns lots 3, 4, 5, and 6, in block 22, of Springer's addition. These lots face east on what is designated as Market street; and Hidelbaugh's dwelling is on lots 1 and 2 and Bridges' on lot 5. Monroe street is north of the block and Vernon on the south. In the year 1907 the town had an engineer make a survey and plat of the town, and he or his assistant went to the county records, and took

3. SAME: change
of boundary:
evidence.

what purported to be copies of all the plats therefrom. The surveyor went to the corner of a building located at the southwest corner of Monroe and Main streets (Main street being the first one west of Market, and according to the plat seventy-five feet in width), and, assuming that corner to be correct, he made his resurvey of the lines and corners of the lots and streets of the town with its additions, and carried the line of Market street west and upon the plaintiffs' lots, so that it took three and one-half feet off the porch on Hidelbaugh's house, and twenty inches off of the porch to plaintiff Bridges' house, leaving that much of each property in the street. The notes accompanying the plat indicated that a stone had been placed at the northeast corner of block 23 of Springer's addition, being at the northeast corner of the block immediately west of the one in which plaintiffs' lots are situated. But the surveyor testified that he could not find this stone, and that: "I had no other definite starting point or definite data, excepting that corner and location of buildings on that same intersection. I found no stone or monument of any kind at the bank corner, except the building itself. I went by the buildings themselves, and what was told me with reference to where the lines originally were accepted by those who lived there and claimed to know." He also testified: "I think I also used the section line or half section line, and checked up the existing old fences, and I think I found a stone at the northwest corner of block 1 in Jackson's addition. There is also a stone which I found located on the east side of Jefferson street, about 20 feet south of the north line of Jackson street. These were shown on the notes of the recorded plat which I had received, and one of the two stones that I have just described was a permanent boundary erected there by the surveyor who laid out these other plats. The other is said to be the boundary of a one-acre tract lying north of what is known as Depot street, and which is east of Jefferson street. From taking measurements from these stones, I could not determine whether or not the corner

of this bank building was an accurate boundary. The investigations that I made indicated that the bank corner is a correct corner; that is from lines, a correct number of lines that existed, that is, from old fence lines. It is generally true that there is some doubt about the exact location of streets and alleys, but I think that this survey is as near correct as possible to be made. This plat that purports to be a plat of Springer's addition, and the town of Grand View don't show any connection with any government corners to be located in any particular tract of land, unless the description in the plat, which I have not read, gives it." He also said: "I found a stone marked on this plat as a section corner, and found a stone on the section line a quarter of a mile west of town. I didn't take any means to verify whether these were government corners. The principal monument was the corner of Garret building as the starting point and existing lines on the ground; that is, by investigation to determine, in my mind, the true lines. The wedge-shaped piece does not appear on the plat book. This strip is 1,785 feet long." Another surveyor, who had been a county surveyor since 1857, testified: "I have surveyed in and around Grand View, and have had occasion to examine the records and plats with reference to Springer's addition, and have tried to be familiar with these records. I have had a good deal of difficulty to definitely locate Springer's addition from the town of Grand View. There is nothing in the plats that shows the town's relation to the sections. I think I established the corner at Garret's store. The corners conform with the streets, as to the fences; that is, as near as I could, but I never felt certain after all. I think I found a stone at the corner of block 22 of Springer's addition in 1860, and I have never been able to find it since. I do not know whether the Garret building was established at the place where I placed the northwest corner. There was a stone at the southwest corner of the block. I recollect that I put the stone there some time, but can't tell how I arrived at that corner. I do not know when I done it, and have no

record that would show. . . . I frequently make surveys in Grand View. I tried, of course, to find the original stone. I didn't succeed in that. In an early day I found a stone at the corner of Dr. Higley's lot, in block 22, of Springer's addition. I think I must have used that as a starting point. I never found anything else. I think the Garret building and the building south agree. There may be a difference of a foot. . . . John R. Sisson made the old survey of the Higley lot. He was then county surveyor. It is the one Mr. Bridges lives on now. Based on the Sisson survey, I made a survey this summer that I thought maybe might give some light on it. I thought it was based on the Sisson survey because Dr. Higley was the owner of where the Bridges property is now, and I thought he knew where the corners were when he set that barn foundation. I took the corner of the Higley barn, a brick corner. It has been in position fifty years. It stands immediately west of the Bridges property, across the alley. Taking the pier of the Higley barn, I made a survey from that." The survey made by this surveyor places the street line one and three-tenths feet east of the one run by the town surveyor, at the northeast corner of block 22, and four feet east of that line at the southeast corner. This old surveyor also testified: "There is a stone at the northwest corner of the Higley lot straight west of the Bridges lot. Measuring from the pier back to this corner I think is one hundred and forty-four feet. The length of the lot as shown by the plat is one hundred and forty-two feet. The town plat gives the alley as sixteen and one-half feet wide, Springer's addition sixteen feet. They have been in the habit of making it either way because of that discrepancy in the plats. My measurement brought the line 18 inches east of Ryans' cement block at Bridges corner by allowing sixteen and one-half feet for the alley."

Buildings and fences were erected upon the lots many years ago, one house as early as 1851, and another fourteen or fifteen years before the trial, and the porches to which we

have referred were either built or remodeled upon practically the same foundations many years ago. When the fences were built, they corresponded with those in the block immediately north of block 22, and every one thought they were on the true line, down to about the year 1905, when the town employed the surveyor. Thereafter a controversy arose, and a committee was appointed by the town council to confer with Bridges. This committee could not agree among themselves, but Bridges understood that he was to construct a sidewalk at a given place, and, acting upon that assumption, he laid a sidewalk at the place indicated, which is the one which defendant town gave him notice to remove. We are constrained to hold that defendant has not produced sufficient testimony to show that the fences erected at what was supposed to be the street line of plaintiffs' lots were not, and are not, upon the true line. The surveyor who made the survey for the town did not start at any known monument or corner, and it is no better than, if as good as, that run many years before by the old county surveyor. The original lines and monuments were all lost, and, in the absence of better testimony, the trial court was justified in taking the testimony of those who erected the improvements and built the fences when the true lines were fresher in the minds of the people, as worth as much, if not more than the unsworn statements of witnesses to the surveyor employed by the town, as to the location of lines, etc., upon which to find a starting point for his survey. In this respect the case is quite like *Corey v. City of Ft. Dodge*, 118 Iowa, 742.

II. Again, while an estoppel will not be found from the erection of fences or the planting of trees and shrubs alone,

it may be established from the erection of substantial improvements by the owner of the lot with reference to a given line with the knowledge and acquiescence of the town. Here houses were built, porches erected, sidewalks laid, fences constructed, and general improvements made with reference to a given line which

4. SAME: estoppel.

corresponded with that on the block to the north, with the knowledge and acquiescence of the town and its officials, and to now remove them will not only render the premises unsightly, but, in fact, destroy part of the porches, leaving part of them in the street. The sidewalk would be upon the lots and inside the street line, and, as we understand it, the line contended for by the city would be crooked and out of joint with that in the block to the north. Such facts clearly make a case of estoppel under the authorities hitherto cited. Plaintiffs do not complain of the decree, and defendants' contention is without merit. The lines and corners were therefore properly established by the trial court, and its decree must be, and it is, *Affirmed*.

S. H. PATE, Appellant, v. T. H. RALSTON.

Sales: BREACH: REMEDIES: ACTION FOR PRICE: CONDITION PRECEDENT. Where the purchaser of goods has repudiated his completed contract the seller may select either of three remedies; he may hold the property for the vendee and sue for the price, or he may keep it as his own and sue for the difference between the market value and the contract price, or he may sell the property for the highest price he can obtain and sue for the balance of the purchase price. Where he elects to rely upon the contract and sue for the purchase price he must fully perform on his part, and failure to set apart the goods for the purchaser, or to deliver or tender the same, will defeat recovery; and the necessity of performance in this respect is not obviated by a notice from the purchaser that he would not accept the goods, and that shipment would be at the seller's risk.

Appeal from Woodbury District Court.—HON. DAVID MOULD, Judge.

WEDNESDAY, FEBRUARY 12, 1913.

ACTION for the purchase price of fruit, shrubs, and trees resulted in a verdict being directed for defendant and judgment entered thereon. The plaintiff appeals.—*Affirmed*.

S. D. Riniker and J. W. Hallam, for appellant.

Herman Walling and T. F. Griffin, for appellee.

LADD, J. The defendant, at the solicitation of one Shearer, an agent of plaintiff, purchased fruit shrubs and trees. The order therefor read: "No. 49. December 6, 1909. I, Thomas H. Ralston, have this day bought of Saddler Bros. Nurseries, Bloomington, Ill., the following bill of trees, etc., to be forwarded in the spring of 1910, which I agree to pay for in cash, value received, when they arrive at Anthon, Iowa. (Here follows list.) Total amount of my order is \$2,215.00. I will not countermand this order. The articles are to be delivered in good condition. [Signed] T. H. Ralston. P. O. Anthon, Iowa, R. R. No. 1, Residence 1½ N. W. J. C. Shearer, Canvasser." The defendant wrote plaintiff February 15, 1910: "I withdraw the order for trees, etc., given December 6th, 1909." To this plaintiff responded two days later: "Kindly read copy of your contract for nursery stock and you will note that the contracts read that you will not countermand the order, therefore your trees will be shipped in proper time for planting, next spring." The defendant, on February 19, 1910, answered: "I decline to receive the trees, and, if you ship them, you will do so at your own risk." A member of plaintiff's firm testified on cross-examination that "the stock was taken from the ground somewhere between the 10th or 15th of December. We sold no other stock of that grade that year except some pear trees, but sold a great deal of other stock, and put it away until the next season whether we have orders for it or not." In the spring following the goods were shipped from Bloomington, Ill., into Iowa, but there was no showing that these ever reached Anthon or were ever delivered or tendered to the defendant. The same witness testified that plaintiff "always stood ready to deliver the goods called for by the order . . . to do so at any time in the shipping season." The state of facts as thus recited was held not to

entitle plaintiff to the recovery of the purchase price, and, as no evidence of market value was adduced as a basis for the measure of damages recoverable on a breach of the contract, verdict was directed to be returned for the defendant.

I. As the order for the fruit trees and shrubs had been accepted, the contract was complete long before the letters were sent to plaintiff, undertaking to repudiate the order. Ordinarily in these circumstances any of three remedies is available to the vendor: (1) He may retain the property for the vendee and recover the purchase price; or, (2) keep it as his own and sue for the difference between the market value and the contract price; or (3) he may sell the property for the highest price he can get and recover the balance of the purchase price. *Hamilton v. Finnegan*, 117 Iowa, 623. It does not appear that plaintiff sold the property, and, as no evidence of market value was adduced, it is evident that neither of the methods last mentioned was contemplated. The remedy first named then must have been relied on, and it has been repeatedly recognized as available in this state. *McAlister v. Safley*, 65 Iowa, 719; *McCormick v. Market*, 107 Iowa, 340.

In order to recover the purchase price, however, everything required of the vendor to pass title must have been performed. *Moline Scale Co. v. Beed*, 52 Iowa, 307. As said by Cole, J., in *McClung v. Kelley*, 21 Iowa, 508: "No sale is complete so as to vest in the vendee an immediate right of property so long as anything remains to be done between the buyer and seller in relation to the thing sold." *Snyder v. Tibbals*, 32 Iowa, 447; *Augustine v. McDowell*, 120 Iowa, 401. The theory on which recovery of the purchase price is allowed notwithstanding the vendee's repudiation of the contract is that by performance on his part the vendor has vested title in the vendee; possession being retained by the vendor for him, and for this reason the latter is entitled to the purchase price. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, (42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112); *Unexcelled Fireworks*

Co. v. Polites, 130 Pa. 536, (18 Atl. 1058, 17 Am. St. Rep. 788); *Ganson v. Madigan*, 13 Wis. 67; *Pusey v. Dodge*, 3 Pennewill (Del.) 63, (49 Atl. 248); 35 Cyc. 5311; 24 Am. & Eng. Ency. of Law (2d Ed.) 1118. "In all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee, must have delivered the property to the vendee, or have done such acts as vested title in the vendee, or would have vested the title in him if he had consented to accept it, for the law will not tolerate the palpable injustice of permitting the vendor to hold the property, and also to recover the price of it." *Shipps v. Atkinson*, 8 Ind. App. 505, (36 N. E. 375); *Dwiggins v. Clark*, 94 Ind. 49, (48 Am. Rep. 140). To permit the vendor to retain title and recover the purchase price would be intolerable, but this is precisely the situation of plaintiff. The fruit trees and shrubs had not been set apart for defendant as had the butter for the vendee in *Mitchell v. Le Clair*, 165 Mass. 308, (43 N. E. 117). Nor had delivery been effected or even tendered.

That defendant in countermanding the order said he declined to receive the trees and that shipping would be at plaintiff's risk would not obviate the necessity of delivery at the time stipulated if plaintiff insisted on performance of the contract. Of course, the rule would be otherwise were the countermand treated as a breach of the agreement and recovery of damages only sought. *Roehm v. Horst*, 178 U. S. 1, (20 Sup. Ct. 780, 44 L. Ed. 953). But in electing to stand on the contract, instead of treating it as breached, he undertook to perform the terms exacted of the seller, and these were not to be performed until spring, and not until performed was defendant required to pay the purchase price. In other words, nothing was then done to pass title to the buyer, and, in the absence of any proof of delivery as stipulated, or tender or waiver thereof, the seller was not entitled to recover the purchase price. *Williams v. Triplett*, 3 Iowa, 518, and *McCor-*

mick Harvesting Machine Co. v. Markert, 107 Iowa, 340, are not inconsistent herewith.

The court rightly directed a verdict for defendant, and the judgment is *Affirmed*.

SARAH J. GOELDNER, Appellant, v. T. L. GOELDNER, Appellee.

Divorce: CRUELTY. A divorce should not be granted the wife on the
1 ground of cruel and inhuman treatment, consisting mainly of bitter and hateful language, where it appeared that the wife was guilty of like conduct, and she failed to show that the cruelty complained of endangered her life.

Same: DISMISSAL OF FORMER ACTION: EFFECT. Voluntary dismissal
2 of an action for divorce and a return to the defendant will not bar the right to subsequently bring a similar action, nor prevent consideration in the later action of the entire life of the parties.

Appeal from Keokuk District Court.—HON. B. W. PRESTON, Judge.

FRIDAY, FEBRUARY 14, 1913.

THIS is an action for divorce on ground of cruel and inhuman treatment. There was a judgment dismissing the petition, and the plaintiff appeals.—*Affirmed*.

F. L. Goeldner and H. F. Wagner, for appellant.

Hugo L. Goeldner and D. W. Hamilton, for appellee.

EVANS, J.—The plaintiff is fifty-three years of age, and her husband is fifty-six. They were married in 1886. Two years later a daughter was born, and this is the only child
of their marriage. She is now married and
1. **DIVORCE:**
cruelty. appears in this record as Lola Smith; she and her husband both appearing as witnesses for the plaintiff.

The petition charges cruel and inhuman treatment such as to endanger the life of the plaintiff. The evidence is voluminous, and covers the entire period of the married life of the parties. It is a story of unhappiness, continuous and intolerable. The cruelty charged consists mainly of language hard and hateful. If the case could be made to rest upon the wrongful conduct and bitter language of one party alone, either would be entitled to a divorce. Each party seems to have prodded the life of the other with a persistent controversy of speech. The harsh words of one have usually been reciprocal to that of the other, and it is difficult from this record to locate the first cause in any controversy. The parties have lived in the same house, but have not cohabited for many years; nor has the plaintiff cooked any meals for the defendant for some years. This state of affairs seems to have arisen out of no other reason than mutual antipathy. The plaintiff has shown abundant wrongful conduct on the part of her husband, but she has failed to show herself reasonably free from similar conduct on her own part. We refrain from going into the details of evidence. Some of it is quite unprintable and exceedingly repulsive. Some of its private disclosures were wholly unnecessary, and furnished no aid to either side, and ought to have been withheld from public gaze. The evidence also failed to show that the cruelty complained of has endangered the life of the plaintiff. It seems incredible that such conduct could be borne without destroying the health of both parties. The health of the defendant has suffered some deterioration for several years. It appears that the health of the plaintiff was poor in the earlier years of her married life, and this may account for much of her impatience and improper conduct. But in later years her health has constantly improved, and she appeared to enjoy, at the time of the trial, as good health and perhaps better than at any previous time.

The plaintiff brought a similar action in 1895. But she later dismissed the same and returned to her husband. Some

stress is laid upon this fact by the defendant. We do not deem such fact as of any particular weight against the plaintiff. It is in no sense discreditable to a wife to dismiss a divorce suit and accept reconciliation, even though she had proper ground for her action. She ought not for that reason alone to bear the ban of adverse presumption. We think the plaintiff herein is entitled to a consideration of the entire story of her married life, regardless of the dismissal of the former suit.

Giving, however, to such evidence the fullest consideration, we feel constrained to say that a decree of divorce cannot be granted under the provisions of our statute. This result has its harshness. If reconciliation be deemed impossible, the plaintiff must suffer most.

In obedience to the statute, however, we must deny her petition.

The judgment below therefore is *Affirmed*.

PRESTON, J., took no part.

G. W. SHIDELER, Appellant, v. TRIBE OF THE SIOUX, et al.,
Appellees.

Intoxicating liquors: ILLEGAL DISTRIBUTION: PLACE: PUNISHMENT.

- 1 A corporation, though organized for a lawful purpose, which maintained a place in a public street walled off by canvas and used as a place for entertaining its guests, and there received and distributed intoxicating liquor to its members and guests, was guilty of violating the statute prohibiting the keeping or maintaining of a clubroom or other place in which liquors are received or kept for use, gift or sale; as the statute not only refers to a clubroom, but includes any place maintained for disbursing liquor; and a violation of the statute in such manner is punishable under the provisions of the Code relating to illegal sales, and the abatement of nuisances.

Same: The dispensing or distribution of intoxicating liquors among the members of an organization constitutes an illegal sale, within the meaning of Code section 2382, as amended, regardless of whether the same is done in any place.

Same: KEEPING OF LIQUOR. An organization which receives and immediately distributes intoxicating liquor among its guests is guilty of violating the statute. It is not necessary that there should be any permanent keeping.

Same: GOOD FAITH DISTRIBUTION. Where an organization actually received and disbursed intoxicating liquors to its members and guests, it did the acts prohibited by the statute, and the question of its good faith or that of its guests is immaterial. It was also immaterial that there was no profit in the transaction, or that it was incidental to the main purpose of the organization.

Same: INJUNCTION: ABATEMENT OF NUISANCE. Where a corporation unlawfully distributed liquor among its members and guests, and its officers claimed the right and expressed the intention to continue to do so, the evidence authorized an injunction restraining the further illegal acts of the corporation and its members actually participating therein.

Appeal from Woodbury District Court.—HON. WILLIAM HUTCHINSON, Judge.

SATURDAY, FEBRUARY 15, 1913.

ACTION for injunction. Plaintiff's petition was dismissed and the injunction denied. Plaintiff appeals.—*Reversed* as to some defendants; *Affirmed* as to others.

John F. Joseph, for appellants.

Henderson & Fribourg, for appellees.

PRESTON, J.—I. The members of the defendant association are good Indians, representative young business men of Sioux City, incorporated for a proper purpose, to wit, to advance the business interests of their home city. The evidence is undisputed, and the question is whether, under the facts, they have violated section 2404 and other provisions of the Code in dispensing and distributing intoxicating liquor to their members and visiting guests.

The facts, as shown by the record, are, as testified to by the secretary of the organization, who was called as a witness for plaintiff: That the defendant Tribe of the Sioux is an auxiliary of the Commercial Club, a boosters' organization, as he calls it, for Sioux City. That it is incorporated, with a president, treasurer, secretary, and a board of directors. That it is not strictly a secret organization, but there is a form of initiation for the entertainment of out of town business and professional men, when guests of the organization. The meetings were held for the entertainment of such guests, who came upon invitation. That the association has no other purpose but promoting trade in the surrounding territory. It has no clubrooms of any kind, nor any office. It does not own any meeting place. There are between eleven and twelve hundred members, who pay a fee of \$5. During the summer and fall of 1911, soon before the commencement of this suit, it held four meetings. These meetings are called "powwows." There is a degree team for putting on what they call dramatic work. Dr. Garver is one of the committee to whom was referred the question of revising a ritual, and he had charge of the so-called ritualistic work in the degree team. The first meeting was in August, at which time the editors of northeastern Nebraska, northwestern Iowa, and southeastern Dakota were its guests. The meeting was held at the Auditorium. Following the meeting a lunch was served on Seventh street alongside of the Auditorium. A six or seven foot canvas wall was thrown about that portion of the street during the time the luncheon was served. A place about one hundred and fifty by sixty feet was shut off to the members of this organization and its guests. Refreshments were served, consisting of several hundred pint bottles of beer, coffee, ginger ale, etc. The luncheon was served on Seventh street by the entertainment committee of the Tribe of the Sioux. Later two such meetings were held during fair week, when practically the same condition existed as to the serving of a Dutch lunch. Beer, ginger ale, and other drinks were

served on the different occasions. Any of the guests or members who desired beer could take it. The leading wholesale houses and manufacturers of Sioux City had abolished the idea of giving trade excursions, as they had done in former years, and devoted the money to the entertainment of these fair week guests, with the aid of the Tribe of the Sioux. There was another such meeting held later, and under the same conditions. Upon these occasions the association rented the Auditorium, when it held its ceremonial entertainments. It has no meeting place at this time; nor has it ever had for any purpose. It has no headquarters, except by the courtesy of the board of directors of the Commercial Club, which has allowed the secretary's headquarters to be there. It was never the object or intention of the Tribe, nor any of its officers, that intoxicating liquors should be kept, used, or dispensed by the organization; and it never has been, except as here detailed. The members and officers never associated themselves for the purpose of having a clubroom or place where liquors could be used, kept, sold, or dispensed at any time. The Tribe has no understanding or arrangement among themselves, or anybody, for the purpose of in any manner, directly or indirectly, evading or violating any of the laws relative to intoxicating liquors. On the occasions when the meetings were held, about 4,000 business men from the surrounding country attended. They were served with luncheon in the street. The beer used was purchased by the Tribe, and was paid for subsequently by the organization. It was delivered on Seventh street. No beer was delivered in the Auditorium, but men were stationed in the door for the purpose of keeping any one from carrying beer into the building. No beer went into the building. No beer or liquor has ever been sold, directly or indirectly, by the association or any of its officers; and they never dispensed or gave it away, except as described herein. The beer used at the meeting was bought immediately before the meeting began, and what was left was immediately carted back to the wholesaler from

whom it was bought. The association was incorporated under the statute governing incorporations not for pecuniary profit, but was organized for business and social purposes. There were two reasons for holding the meetings in the street: One was so as not to embarrass the Auditorium Company, and the other was because it was too warm in the building. A committee had charge of the entertainments. Practically all the street and sidewalk on Seventh street along the Auditorium was securely fenced from the public, and men placed at the doors to see that none got in who had no right to be there, especially young men, minors, and boys. That part of the street so fenced off was lighted overhead with several hundred lights.

The witness also testified that he did not know whether the Tribe of the Sioux would have any more meetings or not, but that he presumed they would, and that he could not answer as to whether they would serve beer if the occasion should arise, and that the Tribe of the Sioux would have to change its methods, if it found it was not doing right. Says he took part in the functions; does not know whether the city gave its permission to use the street; that no violation of the law was intended, and they feel perfectly within their rights.

The foregoing is all the evidence introduced on the trial, and substantially as the witness gave it, as to the purposes of the organization, the manner of conducting their entertainments, and the conditions.

II. Section 2404 reads:

Every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining, any clubroom, or other place in which intoxicating liquors are received or kept for the purpose of use, gift, barter or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell or give away, or assist or abet another in bartering, selling or giving

away, any intoxicating liquors so received or kept, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

Some of the questions in this case are ruled by the decisions of this court in *State v. Johns*, 140 Iowa, 125, and *Sawyer v. Frank*, 152 Iowa, 341. In these cases it was held

that a person violating section 2404 is liable under sections 2382, 2384, and 2405 of the Code; and that the words "dispensing" and "distributing" are synonymous.

1. INTOXICATING
LIQUORS: il-
legal distribu-
tion: place:
punishment.

The defendants contend that under the facts shown there is no violation of law; that the defendant association is not a club; that it was not organized or maintained for the purpose of selling or distributing liquor; that no clubroom or place was kept, used, or maintained for the illegal use or distribution of liquors among its members; that the transaction in question differed in no way from the entertainment of guests by an individual at his private home; that it is not an offense for one to keep or purchase liquor for his own use and the use and entertainment of his guests; that what defendants did was not a subterfuge to evade the law; and that they acted in good faith in the matter.

It may be the impression that section 2404 refers only to a clubroom. To be sure, it does cover a clubroom; but we think it is broader. It provides that "every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining, any clubroom, or *other place* in which intoxicating liquors are *received* or *kept* for the purpose of use, . . . or for *distribution*, or division among the members of any club or association by any means whatever," etc.

If the defendants kept a clubroom or *other place* in which liquors were *received* or *kept* for the purpose of use

or *distribution* among its members, by any means whatever, it would be a violation of the statute. The place walled off by the canvas tent in the street, if not a clubroom, was a place. A place applies not only to a building, but also to any inclosure, whether covered or not. *Brookline v. Hatch*, 167 Mass. 380, (45 N. E. 756, 36 L. R. A. 495); 30 Cyc. 1633. A tent, or a hole in the ground, or the like, would be a place, within the meaning of such a statute as this. The canvas wall used in this case would be none the less a place.

Furthermore, under section 2382 of the Code, as amended (Code Supp. section 2382), it is not necessary that the sale or dispensing be in a place. The dispensing or distribution of intoxicating liquors among the members of
 2. SAME. an organization constitutes a sale. *State v. Johns*, 140 Iowa, 133. A distribution of liquor, under the circumstances shown by the evidence in this case, would bring the parties within said section 2382. But considering the matter further as to section 2404.

Beer was received and used there and distributed among the members of the defendant association. It was kept there also. The statute reads that "every person who shall keep
 3. SAME: keep- or maintain a place," etc. The word "main-
 ing of liquor. tain," perhaps, has a broader meaning than the word "keep." Both words are used in this section; that is, every person who shall keep or maintain, etc.

The defendant association and its managing officers received and kept this beer for the time being. It is not necessary that there should be any permanent keeping. It has been held under another statute, where the language is similar, "if a person keep a house resorted to for the purpose of gambling," that one act of gambling will complete the offense; and that it is as complete, if the house is kept for one day, as if kept for a year. *State v. Crogan*, 8 Iowa, 523; *State v. Cooster*, 10 Iowa, 453. And it has been held that proof of one sale of intoxicating liquor in a building is sufficient to constitute a nuisance. *State v. Reyelts*, 74 Iowa, 499.

If one transaction in distributing liquors among members is equivalent to a sale, and one sale is sufficient to constitute a nuisance, then surely the defendant association, in the different transactions shown by this record, violated the law. So it would seem that it is not necessary that the defendant should have owned the premises, or rented them for any particular length of time, or that it have a fixed place of meeting.

It may be conceded that the defendant association was organized for a proper and legitimate purpose, but that can make no difference. If they did the acts prohibited by law, it would be just as much a violation of the law as though they had been organized for that express purpose. It is hardly probable that an organization of this kind would incorporate and express its intention to sell or dispense intoxicating liquors contrary to law, if that was its purpose and intention.

It is urged by the defendants that they were not evading the law, but that they were acting in good faith, and that its guests were acting in good faith; but, as we have said, if they did the acts that the law prohibits, and kept the place, and used it for the purpose of distributing liquors, they would be guilty. The question of good faith does not enter into it.

4. SAME: good faith distribution. *State v. Mullenhoff*, 74 Iowa, 271. See, also, *South Shore Country Club v. People*, 228 Ill. 75, (81 N. E. 805, 12 L. R. A. [N. S.] 519, 119 Am. St. Rep. 417, 10 Ann. Cas. 383). And this would be true, even though the acts were done openly and without any concealment or evasion; nor does the statute read that if the parties distributed or dispensed the beer in good faith they would be excused.

Counsel for defendants cite the case of *Austin v. State*, 22 Ind. App. 221, (53 N. E. 481,) and quote therefrom at some length. They say they think it has an indirect bearing upon the liquor agitation in this state and the disposition of courts to legislate upon the subject of intoxicating liquors. We disclaim any such disposition, and call attention to the fact, which sometimes seems to have been forgotten, that the Legis-

lature has passed these laws; and we have been and are now trying to interpret them in such a way as to give force to the intention of the Legislature. That case is not at all in point, for the reason that there the defendant was in no way connected with the liquor traffic. He simply furnished liquor to an adult friend, as his guest, in his own private apartments, without price, and as an act of hospitality. The Supreme Court of Indiana held that the Legislature had not intended to go as far as to make this a crime. It is not claimed, and we think it could not be claimed, that section 2404 of our Code would prohibit such an act. The trouble is counsel for defendant assume that the acts done by the defendants in this case are the same as though a person should furnish a drink of liquor to his friend in his own apartments. The fact that there is no profit in the transaction is immaterial. *Sawyer v. Frank*, 152 Iowa, 341. Nor the fact that the distribution or dispensing of the liquor is only incidental to the main purpose of the organization. *South Shore Country Club v. People, supra*.

The defendants did keep a place in which intoxicating liquors were received and kept for the purpose of use and distribution among its members, and, we think, clearly violated the law. It is a legitimate inference that they will continue to do so in the street, or some other place unless restrained. The secretary, as a witness, said he presumed they would. They are claiming the right to do so. This is sufficient. *Bobzin v. Valve Co.*, 140 Iowa, 744; *Sawyer v. Botti*, 147 Iowa, 453.

III. Under the evidence there should be no injunction against the Auditorium Company. It is made a party defendant, but the evidence shows that no liquor was kept in the building; that no sales were made therein, and no distribution made therein. And we think there ought to be no personal injunction against the defendants Garver and Whitley. The testimony does not show that they had anything whatever to do with the distribution of the liquor. Garver

5. SAME: injunction: abatement of nuisance.

simply revised the ritual, and was in charge of the degree team in reference to the other branch of the work of the lodge, having nothing whatever to do with the dispensing or distributing of beer.

The plaintiff has not discussed the question as to his liability, apart from the others, and we do not know just what his theory is as to Garver, unless he claims that the mere fact that he is a member of the organization would make him liable. Under the circumstances of this case, we think that could not be so; the organization of the defendant Tribe being, on the face of it, for a legitimate and proper purpose. It is admitted that plaintiff's attorney is a member of the defendant organization, but has not made himself a defendant, so that, perhaps, we should take that as an indication that he does not claim that the mere fact of membership alone would make the members responsible.

The decree should run against the defendant Tribe of the Sioux and its officers and W. E. Holmes, secretary, who participated in the functions. The treasurer is not a party defendant.

The decree is reversed as to the parties hereinbefore indicated, and affirmed as to the defendants Garver, Whitley, and the Auditorium Company. The cause is remanded for a decree in harmony with this opinion, or the plaintiff may, at his election, have a decree in this court.

Reversed as to some, and Affirmed as to others.

B. H. WIXOM, et al., Appellees v. W. H. HOAR, Appellant.

Actions: CHANGE OF VENUE: IMPLIED CONTRACT: WAIVER OF ERROR.

- 1 An action must be brought in the county where the defendant resides, unless founded upon a written contract expressly providing for performance at some other place. A contract by implication will not confer jurisdiction in a county other than that of defendant's residence. So that where a lease providing for payment of rent in a county other than the tenant's residence had

expired, an action in that county for rent which accrued while the tenant was holding over was on an implied contract, and subject to removal; and the error in refusing the change was not waived by going to trial.

Same: CHANGE OF VENUE: WAIVER. Nor was the error in denying a
2 change of venue in this case waived by reason of the fact that some time after the ruling on the motion to change the defendant filed a substituted answer, admitting that he used and occupied the lands described in the petition substantially on the terms alleged, and that the agreed rental was the sum stated by the plaintiff and was payable at the place specified by him.

Appeal from Union District Court.—HON. H. K. EVANS and
T. L. MAXWELL, Judges.

SATURDAY, FEBRUARY 15, 1913.

ACTION to recover rent. Defendant pleaded a set-off, and, on the issues joined, the jury returned a verdict for plaintiff allowing defendant a part, if not all, of his set-off. Defendant appeals.—*Reversed.*

Meyerhoff & Gibson, and Perry Armitage, for appellant.

D. W. Higbee, for appellees.

DEEMER, J.—Defendant is a resident of Adams county, and on or about December 13, 1905, he rented of plaintiff a certain tract of land in Adams county for the term of one year. The lease was in writing, and by the terms thereof defendant agreed to pay for the use of the land the sum of \$425 as follows: “Notes as follows: \$212.50, December 1, 1906; \$212.50, February 1, 1907, with 8 per cent. interest from maturity.” Notes were executed contemporaneously with the lease, and each of these contained a provision that payment should be made at the “Union County Savings Bank, Kent, Iowa”; Kent being in Union county. Defendant promptly paid these notes as agered, and, according to the

allegations of the petition: "At the termination of the term created in said lease, to wit, March 1, 1907, said defendant held said premises for the year commencing March 1, 1907, and terminating March 1, 1908, without any new lease either verbal or in writing, and with the implied understanding that the same terms and conditions which governed said tenancy in the year terminating March 1, 1907, were applied to the year terminating March 1, 1908. And that thereby the said defendant then and there became bound to pay plaintiffs the sum of \$212.50 at the Union County Savings bank at Kent, Iowa, on December 1, 1907, and the same amount on February 1, 1908, with 8 per cent. from and after said last-mentioned date." Attached to the petition and made a part thereof was the original written lease; and, although the original notes were not attached, they were referred as having been made payable in Union county.

I. This action was brought in Union county, but defendant was served in Adams county, that being the county of his residence. Defendant appeared and filed a motion to change the venue to Adams county because that was the county of his residence. This motion was overruled by Judge Evans, and thereafter the case came on for trial in the district court of Union county before Hon. T. L. Maxwell, Judge, upon issues joined after the overruling of the motion for change of place of trial. There was a verdict for plaintiff in the sum of \$112.50, and from the judgment entered thereon, defendant appeals. The only question raised by the appeal is the correctness of the ruling on the motion for change of venue.

Section 3501 of the Code provides that all personal actions, save as otherwise provided, must be brought in the county in which some of the defendants actually reside, and section 3496 provides, in substance, that when, by its terms, a written contract is to be performed at a particular place, action for the breach thereof may, except as other-

1. ACTIONS:
change of
venue: im-
plied con-
tract: waiver
of error.

wise provided, be brought in the county wherein such place is situated. Section 3504 provides that, when an action is brought in the wrong county, it may be there prosecuted unless defendant, before answer, demands a change of place of trial to the proper county, in which case the court shall order the same at the costs of plaintiff.

Plaintiff contends that this action is brought upon a written contract in which the place of performance is expressly stated to be in Union county, and that in any event defendant waived the error in the ruling, if any there be, by expressly pleading in a substituted answer on the day of trial: "That the defendant admits that he used and occupied the lands of the plaintiff as set out in Exhibit A attached to the plaintiff's petition, for the year ending March 1, 1908, on substantially the same terms as set out in the plaintiff's petition, and that the agreed rental therefor was the sum of \$425, which was payable at the Kent Savings Bank, or the Union County Savings Bank of Kent, Iowa." It will be observed that action cannot be brought in a county other than that of defendant's residence, except it be upon a written contract which expressly provides that it is to be performed at some other place, and the pivotal question in the case is: Is this action brought upon such a written contract? If upon a contract implied as of law or of fact, the statute does not apply, and, if there be a written contract, the agreement to pay or perform at a given place must be express, in order to give a court at that place jurisdiction of the person. A contract arising from implication will not suffice. *Wayt & Son v. Meighen*, 147 Iowa, 26; *Baily v. Birkhofer*, 123 Iowa, 59; *Ft. Dodge Co. v. Willis*, 71 Iowa, 152; *Manley v. Wolfe*, 24 Iowa, 141; *Hunt v. Bratt*, 23 Iowa, 171. It is quite evident that there was no written contract between these parties for the year 1907-08. The written agreement of which the notes constituted a part, was for the previous year, and defendant is to be held, if at all, because of his conduct after the expiration of the written

lease. In many of the states, a tenant holding over after the expiration of a written lease may, at the option of the lessor, be held to be a trespasser, a tenant at will, or a tenant from year to year. *Goldsborough v. Gable*, 140 Ill. 269, (29 N. E. 722, 15 L. R. A. 294); *Gardner v. Dakota*, 21 Minn. 33; *Evertson v. Sawyer*, 2 Wend. (N. Y.) 507; *Ganson v. Baldwin*, 93 Mich. 217, (53 N. W. 171); *O'Brien v. Troxel*, 76 Iowa, 760; *German Bank v. Herron*, 111 Iowa, 25; *Fischer v. Johnson*, 106 Iowa, 181; *Martin v. Knapp*, 57 Iowa, 336. Where the rule obtains that in holding over a tenant is presumed to be a tenant from year to year, the tenancy is subject to all the covenants and stipulations contained in the original lease, so far as applicable to the new condition of things. See cases last above cited. But even here, there is nothing more than a presumption which may be varied by parol testimony. *Gardner v. Dakota*, 21 Minn. 33; *Hyatt v. Griffith*, 17 Q. B. 505, (79 E. C. L. 505).

In virtue of a statute of this state (Code, see section 2991) a tenant holding over is presumed to be a tenant at will until the contrary is shown. But where he holds over for an entire year and the landlord received a part of the rent and recognizes the tenancy, perhaps a tenancy for the year is to be implied, upon the terms and conditions of the old lease, so far as applicable. But even this last statement is doubtful. See *O'Brien v. Troxel*, 76 Iowa, 761, from which we quote the following: "The contention of the plaintiff is that when a tenant for years holds over after the termination of the tenancy with the assent of his landlord, and pays rent according to the terms of the lease, a tenancy from year to year is thereby established. Counsel for the defendant concede that, in the absence of a statute, the preponderance of authority is to this effect; but such, he claims, is not the universal rule in this country. His contention is that there is a statute which changes or modifies the common-law rule. Such statute is as follows: 'Any person in the possession of real property with the assent of the owner is pre-

sumed to be a tenant at will until the contrary is shown.' Code, section 2014. The defendant therefore was a tenant at will, unless the contrary has been shown. The parties did not so agree. There is no contract whereby a tenancy from year to year was created after the time fixed in the lease expired. At most, it may be said that there is a presumption, which obtains at common law, that by reason of the acts and conduct of the parties such a tenancy existed. But it seems to us this must be overcome by the statutory presumption. Both cannot exist at the same time, for the reason that they are antagonistic and inconsistent. To overcome the statutory presumption, it seems to us that something more than another presumption must be shown; such as an agreement or contract. This, it seems to us, is the better, more certain, and definite rule."

Again in *German Bank v. Herron*, 111 Iowa, 25, we said: "At the expiration of the term, Berner, who continued in possession with the assent of his landlord, became, under our statute, a tenant at will. *O'Brien v. Troxel*, 76 Iowa, 760; *City of Dubuque v. Miller*, 11 Iowa, 583. There is no reason, however, for extending the statute beyond its terms. Under the law as it formerly stood, a tenancy from year to year, or for less time, when definitely fixed, as the term in the lease, was implied from the tenant holding over with the assent of the landlord; and this under the same conditions as specified in the contract, in so far as applicable to the new situation. *Herter v. Mullen*, 159 N. Y. 28, (53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517); *Mason v. Wierengo's Estate*, 113 Mich. 152, (71 N. W. 489, 67 Am. St. Rep. 461); *Crommelin v. Thiess*, 31 Ala. 412, (70 Am. Dec. 499); *Goldsborough v. Gable*, 140 Ill. 269, (29 N. E. 722, 15 L. R. A. 294); *DeYoung v. Buchanan*, 10 Gill & J. (Md.) 149, (32 Am. Dec. 156); *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60, (15 Am. Dec. 578). This doctrine has even been extended to leases void as against the statute of frauds, where evidence may be introduced establishing them. *Laughran v. Smith*,

75 N. Y. 205; *Marr v. Ray*, 151 Ill. 340, (37 N. E. 1029, 26 L. R. A. 799). The contract creating the relation of tenancy is implied in every respect as before, save that of duration, and Berner was bound to payment according to the provisions of the written lease. See *Huntington v. Parkhurst*, 87 Mich. 38, (49 N. W. 597, 24 Am. St. Rep. 146). . . . But how long in the future does a tenancy at will, implied under the statute, extend? Is it for an uncertain time, to be fixed at the pleasure of one or both of the parties thereafter? If so, then the extent of the landlord's lien on the property used by the tenant on the premises cannot be estimated, or even conjectured, as the term may run on indefinitely. We think it reaches ahead no further than is required to terminate it by one of the parties. Neither is bound for a longer period. Such a holding is just to the landlord and also to creditors. The former may protect himself by ending the tenancy on thirty days' notice and, if he does not care to do so, his lien for rent to accrue after the lapse of that time from the attaching of other liens will be subject to them; that is, the duration of a tenancy at will at any moment is the period within which it may be terminated on notice. This was the conclusion reached in *Thorpe v. Fowler*, 57 Iowa, 541, where the defendant in May, 1878, went into possession of a building under an oral lease for one year, with the privilege of five, and occupied it till October, 1880. The intervener's mortgage was executed in February, 1880, and the action was for the rent accruing during the five and one-half months previous to October of that year. The lease for one year was valid, only the right to have it extended being void under the statute of frauds. Fowler then at the end of one year became a tenant at will (possibly at the end of two, as suggested in the opinion), under the condition of the oral lease for the payment of rent. The mortgage was adjudged to be the superior lien, because of there being no contract at the date of its execution. Reference was had to an express contract, though possibly the writer of the opin-

ion had in mind the thought, sometimes found in the books, that the obligation of a tenant holding over springs from a duty the law imposes, rather than a contract implied."

To the same effect, see *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595.

No matter which view obtains, it is perfectly clear that the tenant, if bound at all, is held under an implied contract, as is pointed out in the *German Bank* case, *supra*. And the action is upon an implied contract. *Ellis v. Paige*, 18 Mass. (1 Pick.) 43; *Brewer v. Knapp*, 1 Pick. (Mass.) 332.

Plaintiff, in his petition, recognized this rule, for he did not seek to recover upon a written contract, but pleaded facts upon which an implied contract arose. True, the terms of that contract are presumed to be the same as the written one; but it is none the less a parol contract arising by implication. As the action was not and could not have been upon a written contract, there was no written agreement that it be performed at a particular place, and the motion to change the place of trial should have been sustained.

II. Defendant did not waive the error by going to trial. *Foss v. Cobler*, 105 Iowa, 728; *Moyers v. Nursery Co.*, 125 Iowa, 672; *Baily v. Birkhofer*, 123 Iowa, 59; *Hunt v. Bratt*, 23 Iowa, 171; *Kell v. Lund*, 99 Iowa, 153.

Nor did he waive it by the statements in the substituted answer which we have quoted. These statements were long after the erroneous ruling was made; and
 2. SAME: change of venue: waiver. after that the court had no jurisdiction of the matter unless the defendant expressly waived the error and consented that the court be invested with jurisdiction. This he did not do. He did not allege that the contract was written. No estoppel can be found, for plaintiff did not act upon the strength of defendant's statements in his answer.

For the error in overruling the motion to change the venue, the judgment must be, and it is, *Reversed*.

ARVETTA BOOTH, Plaintiff and Appellee v. GEO. W. MARTIN,
Sheriff and J. H. CRILLY, Defendants and Appellants.

Exemptions: AVAILS OF LIFE INSURANCE. Under the statute the avails of life or accident insurance payable to the surviving widow are exempt from liability for debts contracted prior to the death of the husband. So that where the wife, after the death of her husband, signed a note given by him in his lifetime for family necessities, for which she was also liable, the signing of the note merely changed the evidence of her original indebtedness and created no new obligation, although the note provided for interest and attorney's fees; and property purchased with the insurance money was exempt from execution therefor.

Appeal from Monona District Court.—HON. DAVID MOULD,
Judge.

SATURDAY, FEBRUARY 15, 1913.

SURT in equity to enjoin the defendant from levying an execution upon certain real estate of the plaintiff, on the ground that such property is exempt from the execution. There was a decree for the plaintiff and a permanent injunction, and the defendants appeal.—*Affirmed.*

T. B. Lutz, for appellants.

J. A. Prichard, for appellee.

EVANS, J.—The defendant Martin is sheriff of his county, and the defendant Crilly is a judgment plaintiff holding a judgment against the plaintiff herein. He caused an execution to be issued thereon and to be placed in the hands of the defendant sheriff, and caused a levy thereof to be made upon the certain property of the plaintiff.

Plaintiff's claim of exemption is founded upon the fact that the property in question was purchased with the avails of a policy of life insurance upon the life of her deceased husband; and that she is using such property as her home. Section 1805 of the Code contains the following provisions: "The avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, but the amount thus exempted shall not exceed \$5,000.00." We have heretofore held that this exemption may apply to property purchased with the avails of the insurance. *Cook v. Allee*, 119 Iowa, 226.

The contention of the defendant is that the indebtedness upon which his judgment was entered was contracted *after* the death of the insured, and not *prior*; and that therefore no exemption is provided against it by this statute. The facts bearing upon this point are undisputed. The plaintiff's husband died in February, 1909. At the time of his death he was owing the defendant Crilly a note for \$200. This note was executed September 1, 1907, and was given for a past account for merchandise necessities furnished to the plaintiff and her husband. After the death of her husband, and on April 1, 1909, the plaintiff herein signed such note, and judgment thereon was entered against her at a later time. It is the contention of the defendant that the signing of the note by the widow created a new contract on her part; and that therefore it was indebtedness incurred after the death of her husband. The indebtedness for which the note was originally given was clearly indebtedness incurred prior to September 1, 1907. The wife did not sign the note during the life of her husband. But under our statute and repeated decisions she was liable, nevertheless, for the debt. Her liability for this indebtedness did not cease with the death of her husband. It did not cease when she added her name to that of her husband on the note, April 1, 1909. Only the form, or evidence, of her in-

debtedness was changed. But the indebtedness itself was "contracted prior" to the death of her husband.

It is argued that the note provided for 8 per cent. interest and attorney's fees; and that there was, therefore, a new contract to this extent. We find no attorney's fees provided for in the note, unless the following should be construed as such, "with 5% *per month for damages* if collected by an attorney." Be that as it may, interest and attorney's fees are a mere incident of the principal indebtedness. In this case the note itself bore date prior to the death of the husband. We think it comes clearly within the provision of the statute, and the order of the trial court must therefore be *Affirmed*.

G. H. BRAINARD, Appellant, v. H. M. HARLAN, COUNTY
TREASURER OF KEOKUK COUNTY, Appellee.

Taxation: ASSESSMENT: OMITTED PROPERTY. A judgment of the court cancelling an assessment of property made by the assessor and board of equalization, when not appealed from, is final; and the property cannot be again assessed by the treasurer as omitted property.

Appeal from Keokuk District Court.—HON JOHN F.
TALBOTT, Judge.

TUESDAY, FEBRUARY 18, 1913.

SUIT in equity to set aside a listing and assessment by the defendant county treasurer of \$24,900 on moneys and credits belonging to plaintiff for the year 1910. The defendant admitted making the assessment, but pleaded that it was valid, because made on property omitted from taxation for that year. The trial court dismissed plaintiff's petition, and he appeals.—*Reversed*.

C. M. Brown, for appellant.

Frank M. Beatty, County Attorney, for appellee.

DEEMER, J.—The facts are not seriously in dispute, although appellee's counsel, in their statement of the case, omit one important matter as of no consequence. For the year 1910 the assessor of Warren township, Keokuk county, in which township and county plaintiff resided, made the following assessment of plaintiff's property: "G. H. Brainard, Delta, Iowa, Independent Dist. No. 1, actual value, \$25,575; taxable value, \$6,394; number of colts two years old, two; actual value, \$100; horses, four; actual value, \$340; moneys and credits, actual value, \$25,576." And the testimony shows that the assessment on moneys and credits was based upon a contract for the sale of a tract of land which plaintiff had theretofore owned, made and entered into between plaintiff and one Nye on the 3d day of October, 1909, the contract price being \$24,900, \$1,000 of which was paid in cash, and the balance to be paid on March 1, 1910. This was the only land contract held by the plaintiff at the time the assessment was made. Plaintiff, the assessor who made the assessment, and the defendant herein agree that the assessment on moneys and credits made by the assessor was based upon this contract. The assessor, however, fixed the taxable value of the moneys and credits at \$6,394. It appears that, without notice to plaintiff, the township board of equalization increased plaintiff's assessment by adding thereto the sum of \$25,000. Thereupon plaintiff brought an action of certiorari against the board, in which he asked that their act in so doing be set aside and annulled for want of notice. The board appeared to this action, and denied that they had raised, or attempted to raise, plaintiff's assessment. They also averred that "the addition of \$25,000 to the plaintiff's assessment was not the raising of the valuation of plaintiff's property, but was the listing of a written contract of sale of

real estate which had been omitted from taxation, and which the plaintiff had refused to list with the assessor; and the adding of said \$25,000 contract to the assessment roll was done by the assessor as property omitted from taxation." On these issues and some others that case was tried, resulting in a decree that "the action of the defendants, as trustees of Warren township, Keokuk county, Iowa, in adding to the plaintiff's assessment the sum of \$25,000 for the year 1910, be and the same is declared and held to be null and void and not collectible as made by the defendants." We also find that the assessor's book and the tax book of Warren township contain the following entry with reference to plaintiff's assessment: "\$6,250 deducted by order of the district court." This was made by the deputy county treasurer after the books were turned over to the treasurer. On October 20, 1911, the defendant county treasurer, upon report of a tax ferret employed by Keokuk county, made the following assessment against plaintiff:

Assessment.				
Name	Year	Actual Value	Taxable	Rate
Brainard, G. H.	1910	24900	Value	34
			6225	5
Interest	Total	Date of	By Whom	
Road	24278	Assessment	Assessed	
3,113		Oct. 20, 1911		
			County	
			Treasurer	

This assessment was made on the theory that it was upon omitted property; and it is conceded that it was based upon the land contract held by plaintiff, to which we have already referred, and upon nothing else. The assessment made by the assessor, and also by the board of equalization, for the year 1910 was also bottomed upon this same land contract. It is conceded, however, that no taxes were collected by the county upon this land contract for the year 1910. The pres-

ent action is to set aside and cancel this last assessment made by the county treasurer.

For defendant, it is contended that the assessment was properly made and should be sustained, for the reason that the land contract to which we have referred was withheld, overlooked, or for some other cause not listed and assessed and that it was defendant's duty to assess it as omitted property. On the other hand, it is argued for appellant that the property was not withheld, overlooked or from any other cause not listed or assessed. Counsel say that it was assessed both by the assessor and by the board of equalization, and that the county treasurer had no authority to reassess; the remedy of the county in such case being that of appeal to the district court and to this court, if the decree was unsatisfactory. The record shows, without any conflict whatever, that the identical property entered upon the books for taxation as omitted property was, in fact, assessed by the assessor, at least to the amount of one-fourth the value thereof, and that the same property was assessed by the board of equalization, although the latter seems to have erroneously entered it as if omitted from taxation by the assessor. The assessor's books, as returned to the county auditor, show an assessment of moneys and credits, and the amount was based upon the contract in question. The district court held the assessment illegal for some reason, and the county authorities did not appeal, as they should have done in the event the assessor made the assessment, as the records now show without any dispute. The adjudication of the district court is final, however, and cannot be again reviewed by placing the same upon the tax books as omitted property. What the rule might be, had the board of equalization, without notice and without any jurisdiction over the plaintiff, ordered the assessment against plaintiff raised by placing upon the books property entirely overlooked or omitted by the assessor, we have no occasion now to determine. Here the assessor did list and assess it, and it was not withheld, overlooked, or for any

other reason not listed or assessed. If such proceedings, as here adopted, were approved, there would be no end to these tax proceedings; for, no matter how many times a taxpayer might secure a decree that his property, duly assessed, was not taxable, a county treasurer could, at any time within five years, as the law stood when the proceedings under review were had, again assess the property as overlooked or withheld. The statute (Code, section 1374) has reference to the property withheld, overlooked, or from any other cause not listed or assessed, and not to property which has been listed and assessed, but which, for some reason, has been stricken from the rolls.

Under previous holdings of this court, the county treasurer is not authorized by section 1374, or any other section, to enter an assessment against property already assessed by the assessor and the board of equalization and returned to the county officials. *Savings Bank v. Trowbridge*, 124 Iowa, 514; *Tally v. Brown*, 146 Iowa, 360; *Woodbury Co. v. Talley*, 153 Iowa, 28; *Dowling v. Webster County*, 154 Iowa, 603. There must be an end of the right to assess property somewhere, and we are convinced that the right expired here before the county treasurer made his assessment of the contract as omitted moneys and credits.

The decree of the district court must therefore be, and it is, *Reversed*.

STATE OF IOWA, Appellee, v. JAMES BURNS and JOHN
WILLIAMS, Appellants.

Criminal law: BURGLARY: EVIDENCE. In this prosecution for burglary of a bank, the evidence, wholly circumstantial but unexplained, is held sufficient to take the issue of defendants' guilt to the jury, and to support a verdict and judgment of conviction.

Evidence: REFRESHING THE RECOLLECTION OF WITNESS: DISCRETION.
2 Where a witness in testifying to the identity of bank bills was unable to recall the name of the issuing bank, permission to exam-

ine the bills of the bank for the purpose of refreshing the recollection was within the discretion of the court; the good faith of the witness in afterward testifying as of his independent recollection being for the court and jury.

Instructions: OBJECTION TO SUFFICIENCY: REVIEW. An objection that 3 certain instructions were not sufficiently specific will not be entertained on appeal, where there was no showing that the other instructions did not contain the desired specifications.

Appeal from Lucas District Court.—HON. FRANK W. EICHELBERGER, Judge.

TUESDAY, FEBRUARY 18, 1913.

THE defendants were indicted by the grand jury of Lucas county for the burglary of a bank, under the provisions of section 4799a of Code Supplement. Upon a plea of not guilty, a trial was had. There was a verdict and judgment of conviction, and the defendants appeal.—*Affirmed.*

Stuart & Stuart, for appellants.

George Cosson, Attorney General, and *William Collinson*, County Attorney, for the State.

EVANS, J.—No evidence was introduced on behalf of the defendants. At the close of the plaintiff's evidence, the defendants moved for a directed verdict.

I. The principal question presented for our consideration is as to the sufficiency of evidence to sustain the verdict. On

the night of November 23, 1911, a bank bur-
1. CRIMINAL
LAW: burglary: evidence.
glary occurred in the little town of Derby in

Lucas county. The safe was destroyed by the use of explosives, and more than \$4,000 of currency was taken therefrom. That the offense of burglary was committed at the time and place was proven by conclusive evidence. The defendants' counsel concede the *corpus delicti*.

For the purpose of connecting the defendant with the commission of such offense, the state relied wholly on circumstantial evidence. It is the sufficiency of this evidence that is called in question. The state introduced evidence tending to show that the defendants had been in the neighborhood of Derby for several days prior to the burglary; that they were strangers in the neighborhood; that they were apparently without occupation, and were supposed to be tramps; that they were poorly clad and had no means, and did more or less begging; that they were at the town of Osceola, twenty or thirty miles away, on the next day; that they camped with others upon the railroad right of way; that they were found by the city marshal asleep, on the right of way near Osceola, about three o'clock in the afternoon, and claimed to have lost their sleep the night before and to be weary, and protested at being sent out of town; that they made some purchases that day in Osceola; that they left Osceola going east, but were next found a day or two later at Omaha; that in Omaha, on the 26th or 27th, they went together to a clothing store and purchased a hat for the defendant Burns, and a complete outfit of clothing for the defendant Williams, and paid for the same in currency amounting all told to \$54.55; that, of the currency so paid, two \$20 bills and one \$10 bill were issues of the Chariton National Bank, and were wholly new; that a package of such new bills so issued by the Chariton National Bank had been received by the bank at Derby from the Chariton National Bank just before the burglary, and was included in the money stolen at the time of the burglary; that the defendants were arrested November 29th in Omaha, and charged with such burglary; that they had over \$600 in currency upon their persons. The evidence of the state, as already indicated, was wholly uncontradicted. No explanation was offered of the circumstances shown. The defendants were questioned to some extent at the time of their arrest, but they declined all explanation. We think that the evidence was sufficient to go to the jury on the question of

the defendants' guilt. The significance of the circumstances shown consisted in the inferences that could be drawn therefrom, in the light of the whole case. Under the showing of this record, such inferences were fairly within the domain of the jury. While the evidence hangs at some points by slender threads, yet, taking it in its entirety, it impresses us as persuasive. We are united in the view that the trial court properly overruled the motion for a directed verdict.

II. Complaint of error is made in the examination of Clara Burmister. She was the cashier of the Omaha store where the purchases were made by the defendants heretofore

referred to. Immediately after the purchase, she was visited by a detective, who asked her to preserve a description of the bills for future use. She made a written memorandum

2. EVIDENCE: refreshing the recollection of witness: discretion.

of such description for the purpose of such preservation, but subsequently lost the same. On the witness stand, therefore, she testified only from memory. When first interrogated on the witness stand, she was wholly unable to remember the name of the bank of issue. Repeated questions were put to her with the view of aiding her recollection of the name, and this was done under the repeated objection of the defendants' counsel. Finally two bank bills were exhibited to her of the Chariton National Bank. Upon seeing these bills, she testified that her recollection was aided thereby, and the Chariton National Bank was the name of the bank of issue on the bills received from the defendants. Complaint is made that this was an improper method of aiding the recollection of a witness. We think the method was clearly within the discretion of the court. It frequently happens that persons forget names, even those which are familiar, and are temporarily unable to remember them without the aid of their suggestion from some one else. Upon such suggestion, the name "comes back" to the memory. So here the witness might, for the time being, be helpless to recollect the name of the Chariton National Bank, and yet might re-

member it clearly after it was suggested to her. From that point, she testified, not from the suggestion made to her, but from her own memory after the suggestion. Whether such lapse of memory should affect the weight of the testimony should depend largely on the apparent candor and good faith of the witness. The good faith of the witness could be judged in the first instance by the trial judge, in the exercise of his discretion, in permitting the line of examination, and finally by the jury as bearing upon the weight and value of her evidence.

Two instructions are set out in the abstract. No complaint of error is made thereon. But it is urged that they were not sufficiently specific, and that they were too general in their terms. What specifications were contained in other instructions do not appear. For aught that appears in this record, the very lack of specification complained of may have been supplied in other instructions. We may say, also, that we do not think the objection well taken in any event.

The foregoing comprise the principal points presented to us. It is our conclusion that the evidence is sufficient. No error appears.

The judgment below is therefore *Affirmed*.

G. A. LINT, Appellee, v. SAM LINT, PETER LINT and J. H. LINT,
Appellants.

Malicious prosecution: EVIDENCE. Where the plaintiff, in an action
1 for malicious prosecution, was arrested and placed in jail, he may
testify that he felt humiliated, mortified and disgraced by the
accusation, arrest and prosecution for a crime of which he was not
guilty.

Same: PROBABLE CAUSE: INSTRUCTIONS. An honest belief that plain-
2 tiff was guilty of the crime charged, based upon a knowledge of
such facts and circumstances tending to show guilt as would lead

a reasonably prudent man to believe plaintiff guilty of the crime charged, will authorize a finding of probable cause for the prosecution; and where the instructions construed as a whole announced the above rule, a single paragraph on the subject stating that probable cause means such a state of facts and circumstances as would lead a careful and conscientious man to believe that plaintiff was guilty of the crime charged, was not prejudicial, as casting upon defendant a higher degree of care than should be imposed.

Appeal from Dallas District Court.—HON. J. H. APPLEGATE,
Judge.

WEDNESDAY, FEBRUARY 19, 1913.

ACTION to recover damages for malicious prosecution.
Verdict and judgment for plaintiff. Defendants appeal.
—*Affirmed.*

Clark & Hutchison, and White & Clarke, for appellants.

Burton Russell, and J. L. Witmer, for appellee.

GAYNOR, J.—It appears that on or about the 11th day of March, 1911, the defendant herein, Sam Lint, appeared before a justice of the peace in and for Polk county, signed and filed an information charging the plaintiff herein with the crime of forgery; that, upon the filing of said information before said justice, a warrant was issued by said justice for the arrest of this plaintiff; that the plaintiff was arrested and placed in the Polk county jail; that thereafter the plaintiff gave bail and was released; that subsequently, upon hearing had upon the said charge, the plaintiff herein was discharged, and the plaintiff now brings this action to recover damages from the defendants alleging that the accusation against him was false and malicious and without any probable cause therefor. The plaintiff further claims that the other defendants, Peter Lint and J. H. Lint, conspired

and confederated together with the said Sam Lint in the making of said charge, and with the intent of falsely and maliciously prosecuting the plaintiff upon said charge, without any probable cause for believing the plaintiff guilty of said charge. The defendants answered the plaintiff's petition in this cause, and in their answers admit that an information was filed by Sam Lint, charging the plaintiff with the crime of forgery; that a warrant was issued thereon and plaintiff arrested; that a preliminary hearing was had before the justice upon said charge and the plaintiff discharged. The defendants deny each and every other allegation. A trial was had upon the issue, so joined, to a jury, and a verdict rendered therein in favor of the plaintiff against all the defendants for the sum of \$600, and the defendants appealed.

The defendants, being appellants herein, complain of the action of the court in allowing plaintiff to testify as to his feelings and to the effect upon his feelings of the

1. **MALICIOUS PROSECUTION:** evidence. arrest and incarceration in the public jail, and in permitting plaintiff to state, over the objection of defendants, that "it hurt him to think he was arrested for something he had not done and to be accused of something he was not guilty of, that he felt humiliated and disgraced and mortified on account of the prosecution," and the objection to this testimony is made and urged on the ground that it was a question for the jury to decide, and not for the plaintiff, as to the effect the prosecution had upon his feelings; that the plaintiff might have been peculiarly sensitive, or he might have a disposition that would cause him to be little, if at all, affected by the arrest and prosecution; that it might be a fact that the plaintiff was very touchy and sensitive and was easily affected by such small matters as being arrested and thrown into jail, whereas a man of ordinary sensitiveness would not have experienced these feelings of mortification, humiliation, and disgrace; and that the jury should be allowed to determine, from all the facts and circumstances of the case, without any revelation from the

plaintiff as to how he actually felt, what would be the experience and feeling of a man of ordinary sensibilities under the circumstances in which plaintiff was placed, and base their judgment on that, in fixing the amount of damages, unaided by the statement of the plaintiff as to how it affected him. This question, however, has been decided by this court in *Flam v. Lee*, 116 Iowa, 289, in which it was said:

We know of no rule of law which prohibits a plaintiff from attempting to describe his mental suffering while in custody. It is true, perhaps, the jury may properly be left to infer such sufferings from the circumstances of his situation, and it is true that the average witness finds it difficult to describe his mental condition in apt terms. But it does not follow that such description, when made, is not proper in evidence. If a man who has been wrongfully prosecuted for crime feels a sense of shame and humiliation that such a charge should be laid at his door, or that he has been disgraced in the eyes of his neighbors and friends, or is tormented with fear that his incarceration may bring sorrow and disgrace to his home, we think he should be permitted to say it.

It is next urged by the appellant in its statement of what constitutes probable cause that the court erred, in

2. SAME: probable cause: instructions.

this, that it said to the jury in the second instruction: " 'Probable cause,' as used in these instructions, means such a state of facts and circumstances as would lead a careful and conscientious man to believe that the plaintiff was guilty of the crime charged." And it is urged that this definition places a greater burden upon one filing a charge of this kind and a higher degree of care than should be imposed, and the appellant relies upon *Flackler v. Novak*, 94 Iowa, 634, and perhaps appellant's contention would be right if that were all of the instruction; but, immediately following this statement of what constitutes probable cause appears what is conceded to be a correct statement of the law, to wit: "If

the defendant honestly believed that plaintiff was guilty of the crime charged, and such belief was based on knowledge of such facts and circumstances, tending to show guilt, as would cause an ordinarily reasonable and prudent man to believe plaintiff guilty of the crime charged, the jury should find there was probable cause for the prosecution, and, in the event of such finding, then the jury should return a verdict for the defendant." And in the third instruction the court said to the jury again: "Probable cause for the institution of criminal proceedings against a party does not depend upon the question of whether or not the person so prosecuted was actually guilty of the crime, but it is a question whether or not an ordinarily prudent and careful man under the facts as they appear to be, in the exercise of reasonable care to ascertain the facts, and from the knowledge or honest beliefs of the facts then had, would be justified in an honest belief that a crime had been committed and the person accused guilty of such crime." These instructions must be taken together, and we think the error, if any, complained of, was without prejudice. In support of this, see *Jenkins v. Gilligan*, 131 Iowa, 176.

It is next contended that the court erred in submitting to the jury the question of the liability of the defendants J. H. Lint and Peter Lint, on the ground that there was no evidence that would justify submitting that question, and no evidence that would justify the jury in returning a verdict against them, and that the verdict against them is contrary to the instructions of the court and contrary to the evidence. We have examined the record with some care upon this point and are satisfied that there is enough appearing in the record to justify the court in submitting the question to the jury. We find no error in the manner of the submission. There is evidence upon which the jury might well have found against these defendants, and, having found against these defendants, and, having found against them upon that evidence, we have no concern with their finding.

No error appearing in the record, the judgment is *Affirmed*.

JANE E. ADAMS, Appellee, v. E. C. JUNGER, Appellant.

Malpractice: CONTRADICTION INSTRUCTIONS. Where the court, in an
1 action for malpractice, took from the jury all question as to negligence of defendant in the treatment of the injury, and told them that there was no evidence that failure of the broken bones to unite, or that the condition of the limb or of the fracture, was due to any negligence or want of skill on the part of defendant, subsequent instructions in which the court submitted the question of defendant's skill in diagnosing the injury and in allowing the fractured part of the bones to remain in the flesh, producing bodily pain and mental suffering, and also authorizing the jury to award damages for pain and suffering during defendant's treatment of plaintiff, were contradictory and conflicting.

Same: NEGLIGENCE: EVIDENCE. In this action for malpractice the
2 evidence is reviewed and held insufficient to authorize submission to the jury of the question of defendant's negligence in his original treatment of the injury, or in the use of appliances.

Same: INSTRUCTIONS. Where an action for malpractice was tried on
3 the theory of negligence in failing to discover a fractured bone protruding into the flesh and causing pain, instructions that there was no evidence of failure of the bones to unite or that the condition of the injury was due to negligence of defendant, and that if defendant did not use reasonable skill in diagnosing the injury and allowed fractured bones to remain in the flesh, did not present the case as tried in a manner to be understood by the jury.

Same: EVIDENCE. The evidence in this action is also reviewed and held
4 insufficient to authorize submission of defendant's negligence in failing to discover a fractured bone protruding into the flesh and in not preventing the pain resulting therefrom.

Evidence: NON-EXPERTS: HARMLESS ERROR. A non-expert witness
5 is not competent to testify in an action for malpractice that plaintiff suffered pain, or that she was afflicted with a certain disease; but where defendant treated plaintiff for rheumatic pains his testimony that she suffered such pain was harmless.

Same: EXPERTS: HYPOTHETICAL QUESTIONS. Hypothetical questions 6 put to an expert witness on his examination in chief must be based on what the testimony proves or tends to prove.

Same: NEGLIGENCE: RECOVERY: INSTRUCTION. In this action for 7 malpractice, tried upon the theory that defendant was negligent in not discovering that a fractured bone protruded into the flesh, and in not relieving the pain resulting therefrom, plaintiff could not recover unless there was evidence that such condition existed during the time of defendant's employment, and prior to an operation by another.

Appeal from Monona District Court.—HON. DAVID MOULD,
Judge.

WEDNESDAY, FEBRUARY 19, 1913.

ACTION for malpractice. Defense a general denial. Verdict for plaintiff in the sum of \$1,000 upon which judgment was rendered, and defendant appeals.—*Reversed.*

Wade, Dutcher & Davis, and C. E. Cooper, for appellant.

J. A. Pritchard and J. W. Anderson, for appellee.

DEEMER, J.—The specific allegations of negligence were:

That the fracture of plaintiff, as set forth in plaintiff's petition, was such a fracture as the ordinarily skillful physician and surgeon could readily and would have readily reduced. That the defendant failed to reduce the same, or, if said fracture was reduced by the defendant, then the defendant failed to properly care for and keep said fracture in place by using proper appliances and care necessary to keep said fracture reduced. That the defendant was careless and negligent and unskillful in failing to properly examine and discover the condition of said wound and fracture, and allowed the same to remain in a fractured condition, with the bone extending into the flesh, when the defendant might, by using ordinary care and skill, have discovered the condition of plaintiff and remedied the same. That the

defendant failed to properly examine said wound, or to discover the condition of the fracture, although warned by the plaintiff as to the condition of the same, in so far as she knew. That the defendant was negligent, careless, and unskillful, if, as a matter of fact, he reduced the fracture, in not so adjusting his bindings and other appliances in such a manner as to hold the fracture in place, and in not examining the plaintiff's wound and fracture and discovering its condition, and then using the proper remedies.

In submitting the case to the jury, the trial court thus stated the issues:

Plaintiff claims that the defendant was negligent in the treatment of plaintiff in this: That he failed to reduce the fracture, or, if said fracture was reduced, that he failed to properly care for and keep said fracture in place by using proper appliances and care; that he was careless and negligent in failing to properly examine and discover the condition of the fracture, and allowed the same to remain in a fractured condition, with the bone extending into the flesh, and the defendant, by using ordinary care and skill, might have discovered the condition of the fracture and remedied the same. That the defendant was further careless and negligent in not adjusting his bandages and other appliances in such manner as to hold the fracture in place, and in not examining plaintiff's wound and fracture. That the injuries suffered by the plaintiff, and herein complained of, were caused by the carelessness and negligence of the defendant, and not by reason of any carelessness or negligence of the plaintiff. . . .

After thus stating the issues tendered by the petition, the court charged as follows:

Par. 4. Before the plaintiff can recover anything in this action, she must prove to you by a preponderance of the evidence: First. That the defendant was negligent in one or more of the particulars charged in the petition, as set forth in paragraph 1 of this charge. Second. That the negligence proven was the proximate cause of the injury of which plaintiff complains in her petition. Third. That she herself was free from negligence contributing to the injury complained of,

Par. 6. That plaintiff charges in her petition that the defendant failed to reduce her fracture, and failed to properly care for and keep said fracture in place by using proper appliances and care necessary to keep said fracture reduced. But you are instructed that the plaintiff has not introduced evidence sufficient to submit to the jury the question as to whether, in the original treatment of plaintiff, and in the use of the appliances which the evidence shows the defendant did use, there was any negligence on the part of the defendant; and this charge of negligence is withdrawn from your consideration, and you will not take the same into consideration in arriving at your verdict. And there is no evidence that the failure of plaintiff's fracture to unite, or the present condition of her limb and said fracture, are the result of any negligence or want of skill on defendant's part, and you cannot hold him responsible therefor.

Par. 7. The plaintiff charges that the defendant was negligent and unskillful in failing to properly examine and discover the condition of the fracture, and allowed the same to remain in a fractured condition, with the bone extending into the flesh, when he might, by using ordinary care and skill, have discovered the condition of plaintiff and remedied the same. And if you find from the evidence that plaintiff suffered a fracture of the femur, whereby the fractured parts were displaced, causing the limb to evert, and causing intense pain in the region of the fracture, and you further find that the defendant, in the exercise of the knowledge, care, and skill usually exercised by physicians and surgeons in similar localities in the treatment of like cases, should have discovered the displacement of the broken bones and adjusted the same, and failed to do so, then he would be liable in this action for any bodily pain and mental suffering caused by the failure to discover and adjust the displacement, and to which the plaintiff did not contribute by acts of carelessness or negligence on her part. But if plaintiff has failed to prove to you by a preponderance of the evidence that the pain and suffering of which she complains was caused by the displacement of the fractured parts, or if she failed to prove to you that the defendant, in the exercise of that degree of knowledge, skill, and care ordinarily exercised by physicians and surgeons in similar localities, should have discovered the displacement and adjusted the same, then the plaintiff can-

not recover in this action, and your verdict should be for the defendant.

Par. 8. You are instructed that plaintiff can only recover, if at all, in this case for physical pain and mental suffering, if any, endured by plaintiff prior to the time Dr. Conn performed his operation, and only for such pain and suffering as is shown by the evidence to have been the proximate result of defendant's negligence and unskillfulness, if any, in failing to discover and adjust the displacement of the fractured parts. Plaintiff cannot recover damages for any pain or suffering resulting from the fracture and the proper treatment thereof; nor can she recover for pain and suffering resulting from rheumatism; nor can she recover in this case for loss of time or decreased ability to perform labor.

I. These instructions are complained of as being contradictory and conflicting, and as being fundamentally wrong on any theory of the case. While it is difficult to discover the theory which the court had in mind, it is apparent, we think, that the objections to these instructions are well founded. The court took away from the jury the question of defendant's treatment of the fracture, and specifically said that there was no evidence that the failure of the bones to unite, or the present condition of the limb or of the fracture, was due to any negligence or want of skill on the part of the defendant. But in the next instruction the question of his skill in diagnosing the injury and in allowing fractured part of the bones to remain in the flesh, producing bodily pain and mental suffering, was submitted. It is difficult to reconcile these instructions, save upon the theory that, while defendant's treatment was proper, he might at some time, by the use of ordinary care and skill, have relieved plaintiff from some of her suffering due to a misplaced bone, although he could not have reduced the fracture or secured a union of the bones. These two theories are hardly consistent, unless it be as plaintiff's counsel contend in argument, that after he had concluded his treatments, he did not properly instruct plaintiff as to

1. MALPRACTICE:
contradictory
instructions.

the care of her limb, or did not properly examine it to see if any bones were then protruding into the flesh, producing pain which might have been alleviated by the use of proper care. This, however, was not the thought of the pleader in framing his petition, and no such specification of negligence is made.

Aside from this, the eighth instruction, which we have quoted, clearly allows the jury to award plaintiff damages for all pain suffered by her prior to the time a second operation was performed, by a Dr. Conn, to relieve her condition. This involves the idea that defendant's diagnosis and treatment of the case from the beginning might be found to have been improper, although the court expressly said in the sixth instruction that defendant properly cared for and kept the fracture in place by using proper appliances and care in keeping the same reduced, and that there was no testimony showing or tending to show that in the original treatment, or in the use of appliances, there was any negligence whatever. If the court had in mind the thought that defendant did not, in discharging plaintiff, properly direct her as to the care of the limb, or that he did not then examine her for misplaced bones, he should have instructed the jury that it could not allow for any pain or suffering occurring prior to the time that defendant was found to be negligent. In other words, if, as the court instructed, defendant was not negligent in his original treatment, he cannot be held for any suffering endured by plaintiff during the time this treatment continued; and, if held responsible for something occurring after this treatment ceased, he should only be held liable for such pain and suffering, if any, as resulted from his negligence at that time, and not for what might have been endured from the beginning. And, in any event, plaintiff cannot recover, unless she proves the negligence charged in her petition, and her damages must be limited to such as proximately arose from the negligence charged. These principles are very fundamental, and need no citation of authorities in their support.

II. In view of a retrial, we shall consider some of the other errors assigned. This necessarily involves a statement of some of the facts as disclosed by the record.

2. SAME: negli-
gence: evi-
dence.

Plaintiff is a married woman, and on the 11th day of January, 1911, she suffered a fracture of the neck of the femur of her left limb. Just how it happened is not known. Defendant, who is a physician and surgeon, was immediately called to treat the fracture, and arrived at plaintiff's house within an hour and one-half of the time she received her injuries. He began his treatment immediately, applied splints, and, as the court said in its instructions, used proper appliances, and continued to treat his patient until May 29, 1911, when he made his last professional visit. On June 5th plaintiff's husband called on defendant, paid his bill for services, and made no complaint of the treatment that had been given. He did say, however, that he expected to call another doctor by the name of Conn; but he made no request of defendant to continue his treatment. The relations between the doctor and his patient and her husband continued to be friendly; for defendant thereafter made a social call upon plaintiff, and also sent a stretcher down to her house, which was thereafter used in taking plaintiff to a hospital at Ida Grove. After defendant's discharge, and some time during the month of June, a doctor by the name of Bowie made a social call upon the plaintiff; but she said nothing to him about her suffering or about the fracture. On June 20th both doctors, Conn and Bowie, were called to examine the plaintiff, and they found her suffering great pain. At the suggestion of one or the other, or both, plaintiff was taken to Dr. Conn's hospital at Ida Grove on June 24, 1911, and an X-ray examination was made, which resulted in a discovery of the fact that the fracture had not been reduced; that there was a nonunion of the broken bones; and that one end of the bone had extended up into the flesh for an inch or more, causing excruciating pain. Upon this discovery being made, Dr. Conn pulled the leg

down and everted it, giving at least temporary relief. Plaintiff stayed at the hospital a day or two and then returned to her home, receiving no further medical attention. It was shown that during the time defendant was treating plaintiff, she (plaintiff) suffered pain, and, as this was thought to be due in part to rheumatism, defendant gave her medicine to relieve this pain, and did give her temporary relief; but all the doctors say that such a fracture as plaintiff received always causes great pain, and the trial court instructed, and as we think properly, that there was no testimony of any negligence on the part of the defendant in his original treatment, or in the use of the appliances, which he did in fact use.

The theory of the trial court in submitting the case can only be gathered from the instructions already quoted, and from the following remarks of the court, made in passing upon defendant's motion for a directed verdict. These were as follows:

3. SAME: Instructions.

By the Court: I don't think there is any evidence to go before the jury as to the negligence at the time of the setting of the limb. But as time goes on there was sharp pain, which was complained of, and, as I understand Dr. Conn's testimony, that he concluded from these very same symptoms that there was a nonimpacted fracture, and it should have been discovered, and that he did discover it. By Mr. Dutcher: I don't think that Dr. Conn said that. He said at the time he saw it there was a nonimpacted fracture, but he could not tell whether it was nonimpacted before or not. By the Court: I understand there was no change of condition from the time that Dr. Junger was discharged until Dr. Conn took charge of the case. By Mr. Dutcher: There is no evidence that they were the same. By the Court: I think the case should go to the jury on that one proposition, and if Dr. Junger, in trying to diagnose the case, should have believed that pain and suffering was caused by a nonimpacted fracture, and in the exercise of a reasonable care that he should have relieved that pain. By Mr. Dutcher: Is there any duty on the doctor to relieve that pain? The patient must suffer pain.

By the Court: They must endure the pain that is necessary, but no unnecessary pain. By Mr. Dutcher: What evidence is there that it was the result of this man? By the Court: The evidence of Dr. Conn is that he reduced it, and there was immediate relief. I shall submit it to the jury on that one proposition. (Motion overruled, and defendant excepts.)

These remarks furnish the key, if any there be, to the solution of the questions presented. Therefrom we conclude that the court thought there was enough testimony to take the case to the jury upon the question as to whether or not defendant, in the exercise of proper care on his part, might not have discovered the fact that there was a bone protruding into the flesh, which might, by proper care, have been removed, and plaintiff relieved of the pain caused thereby. The difficulty here lies in the fact that this thought is not brought out in the instructions in such a way that the jury would understand it, and in the further fact that the evidence does not show whether the fracture was an impacted or nonimpacted one; fails to disclose the exact nature of defendant's treatment (that is, as to whether he used an extension or not), although the trial court squarely instructed that his treatment was proper; fails to show when the bone protruded itself into the flesh; and fails to show that plaintiff's suffering during the time she was being treated resulted from a protruding bone. All these things are left to the merest surmise or conjecture. It is true there was testimony as to this bone protruding on June 24th, but nothing to show that it was in that condition while defendant was treating the case, or as to when it in fact took place. The testimony from the experts clearly shows that the treatment for an impacted fracture of the neck of the femur is quite different from a nonimpacted fracture at that point. In the one case no extension appliances are used, while in the other they are indicated. The trial court found that proper treatment was given and proper appliances used, so that whatever pain plaintiff suffered during the continuance of this treat-

4. SAME: evidence.

ment must have been due, if the trial court was correct in its instructions, either to the pain incident to the fracture itself, or to rheumatic pains; and for neither of these would defendant be responsible. The only proof which plaintiff has on this proposition is the condition in which the limb was found on June 24th, when the X-ray examination was made; but the experts say that this, in itself, is no proof of the condition at the time the injury was first received, or even at the time defendant made his last visits. Presumptions do not ordinarily relate backward. A condition, once shown, may be presumed to continue; but ordinarily from a condition once found no presumption is indulged that it has existed for any given time in the past. True such presumptions some time arise in virtue of the nature of the condition; but this arises from proof of other things in addition to present conditions; as its condition of permanency or progressiveness. Here there is no such proof. Indeed, all there is on the point is to the contrary. Now, as we have said, there is no direct testimony as to the nature of the fracture in the first instance, and no direct proof as to whether or not an extension was used in the reduction of the fracture; but the trial court said, whatever the treatment, it was proper, and the appliances used were correct. We are constrained to hold that there was not enough testimony to take the case to the jury on the thought indicated by the trial court in ruling on defendant's motion to direct a verdict, even assuming that such an issue was presented by the pleadings.

III. Some of the rulings on testimony are complained of. For example, it is argued that certain nonexpert wit-

5. EVIDENCE :
 non-experts :
 harmless er-
 ror.
 nesses were permitted to state, not only that plaintiff suffered pain, but that she was or was not afflicted with a certain disease, naming it.

Of course, nonexperts should not be permitted to give such testimony. See 5 Encyc. of Evidence, page 698, and cases cited; *State v. Hockett*, 70 Iowa, 442. While nonexpert witnesses in this case were permitted to testify as to the nature

of plaintiff's ailments, the testimony was nonprejudicial to defendant; for he was treating plaintiff for that kind of ailment, to wit, rheumatic pains.

Hypothetical questions put to an expert upon his examinations in chief should always be based upon facts which the testimony proves or tends to establish. *In*
 6. SAME: experts: hypothetical questions. *re Will of Ames*, 51 Iowa, 596; *State v. Cross*, 68 Iowa, 180; *Bomgardner v. Andrews*, 55 Iowa, 638. This rule was not always observed by the trial court. We need not stop to set out the objectionable questions; for it is enough to restate the rule.

IV. The defendant also asked the following instruction:
 "You are instructed that, unless you find under the evidence that on May 29, 1911, or some time prior thereto, the limb of plaintiff was in substantially the same condition, as to the bones extending up into the flesh, as at the time Dr. Conn treated the plaintiff, your verdict must be for the defendant." If
 7. SAME: negligence: recovery: instruction. we understand the theory adopted by the court, this instruction should have been given. The nature of the case is peculiar, and we have had much difficulty in discovering the theory of counsel for appellee in endeavoring to sustain the verdict and judgment. They say in argument.

The court must bear in mind that we are not asking damages for a failure of the bone to unite. That question was taken from the jury by the court. So that the argument of counsel as to the extension treatment, and, in fact, the treatment of the fracture as discussed by them, was not at issue. A large portion of defendant's argument is taken up by these questions that we insist are not in the case. Counsel keeps referring to the treatment of this fracture. We have made no complaint, as stated before, of the treatment until after the doctor told the plaintiff and her husband, as above shown, that the bone was united, and the treatment of the broken limb, so far as the fracture was concerned, had ceased. The limb was reduced, certain appliances were put upon it, and it remained in that condition until the doctor said it was time

they should be removed. They were removed, and the plaintiff was informed that her limb was united. It was after this that we claim that the doctor was negligent, careless, and unskillful in his treatment and in his diagnosis of the case; that he permitted a broken bone to remain imbedded in the flesh, that was causing intense pain, and failed to discover the cause of the pain or the remedy. In the month of March the plaintiff and her husband were told that there was a good union. He took hold of the limb and worked it up and down. It is probable that at that time the bones became disconnected and later worked into the flesh. It certainly was a very unskillful thing for any doctor to do, when the patient was as old as the plaintiff at this time.

The trial court did not submit the case on this theory, and the jury were not so instructed. The jury was not limited to what transpired after the bandages on plaintiff's limb were removed; nor was there any claim in the petition nor proof sufficient to take the case to the jury on the theory that defendant, by his manipulation of the limb in March, "disconnected the bones." Such a finding, even if it had been authorized by the instructions, would have been the result of pure surmise and conjecture.

For the errors pointed out, the judgment must be, and it is, *Reversed*.

LEMUEL G. HATTON, Appellant, v. WILLIAM M. WHEATON,
Administrator of Estate of Nancy S. Wheaton, Deceased.

Estates of decedents: HEIRS: LISTING. One related to a decedent
1 simply by affinity is not an heir to his estate and need not be listed
as such by the administrator.

Same: WILLS: REMAINDERS. Where the testator devised his real
2 property to his wife for life, with power to control, use the income
and to convert the same into other property, with the remainder
to his children in equal shares, the portion left upon the death of
the wife, and that acquired by her out of the proceeds of the

estate, passed to the remaindermen, the administrator as such having no interest therein.

Same: DESCENT AND DISTRIBUTION: HEIRS: TITLE TO REAL ESTATE.

- 3 Under a will creating a life estate in the widow, with the remainder in testator's children, the husband of a child who predeceased the widow was not entitled to any part of the widow's estate, either as heir or otherwise, and her administrator properly refused to recognize him in the distribution of the estate; and whether he would take a third of the share devised to the deceased child was not a matter of concern to the administrator, except as it might have come into his possession; and the title to the deceased child's share in the realty was not a matter which could be litigated in the probate proceedings.

Same: DISTRIBUTIVE SHARE: ACTION: PARTIES. Under a will devis-

- 4 ing real estate to the wife for life, with power to use and convert the profits into other property to be held on the same conditions, and devising the remainder to the testator's children, the administrator of the widow, on coming into possession of the testator's property, was accountable to the testator's executor or to the remaindermen therefor; and in an action by the husband of testator's daughter, who predeceased the widow, against the administrator of the widow to compel recognition of his interest in the share of his deceased wife, the testator's executor and the children of plaintiff's wife were necessary parties.

Appeal from Wapello District Court.—HON. F. W. EICHELBERGER, Judge.

WEDNESDAY, FEBRUARY 19, 1913.

FIVE grounds of the demurrer to plaintiff's petition were sustained, and one ground thereof overruled. The parties elected to stand on the rulings, and the petition was dismissed. Both parties appeal; that of plaintiff being first perfected.—*Affirmed.*

W. Glenn Cowell and Roberts & Webber, for appellant.

Chester W. Whitmore, for appellee.

LADD, J.—J. S. Wheaton died testate in 1897. His will was admitted to probate, and after providing certain legacies, disposed of the residue of his estate as follows:

I give, devise and bequeath unto my beloved wife, Nancy S. Wheaton, all the rest and residue of my property and estate of whatsoever kind and nature, and wheresoever situated, for and during her natural life, with the right to use, control, and manage the same, and to use and appropriate all the income and profits therefrom, after paying the taxes and keeping up the repairs, with the remainder over to my children by her, to wit, Kate Eva Hatton, Cora Ella Baker, John D. Wheaton and Cyrus Franklin Wheaton, in equal shares. I also hereby authorize and empower my said wife to sell, deed, and convey any part of said property, and to convert the same into other property in such manner as to her may seem wise and best, the property so exchanged for, or procured by such sales or exchanges from time to time, to be held by her in the same manner as the original property; the remainder to be disposed of finally to our children as last aforesaid.

This was declared to be in lieu of dower, and the widow was named as executrix, without bond, and given a free hand in the settlement of the estate. Kate Eva Hatton, mentioned in the clause quoted, died in 1905, leaving her surviving her husband, plaintiff herein, and two children, Lemuel G. and Elaine Louise Hatton. The widow, Nancy S. Wheaton, died in 1910, and the defendant, Wm. M. Wheaton, is the administrator of her estate. The petition alleges the foregoing facts, and in addition thereto that the testator left a large amount of property, real and personal, describing realty undisposed of by his widow, and other realty acquired by her, with the proceeds of property left by him, and that she left personal property of about the value of \$10,000, which belonged to the estate of the testator and passed into the hands of defendant as administrator of the Nancy S. Wheaton's estate; that plaintiff, as surviving husband of Kate Eva Hatton, is entitled to one-third of the interest she acquired in the

estate of J. S. Wheaton, deceased, but the defendant has in no manner recognized his interest therein in distributing said personal property, has obtained a large part of the real estate left by the testator, and which was subsequently acquired by the widow with the proceeds of property of testator's estate, without regard to plaintiff's interest therein; and he prays: (1) That defendant be required to appear and show cause why he should not recognize plaintiff as entitled to one-third in value of the property left his deceased wife under the will; (2) why he should not amend the list of heirs filed by him as administrator of Nancy S. Wheaton, deceased, "and for the purpose of showing him as entitled to his distributive share in all of the property, both real and personal, left by J. S. Wheaton, deceased, and all of the property acquired by Nancy S. Wheaton, with funds obtained from the sale of property belonging to said J. S. Wheaton, and which was left to the wife of your petitioner, Kate Eva Wheaton, subject to provisions in said will in favor of Nancy S. Wheaton, and asking that you be required to file a supplemental or amended list of heirs in said estate of Nancy S. Wheaton, giving the name of this petitioner, Lemuel C. Hatton, as one, and showing him entitled to his distributive share in all of the property, both real and personal, left by J. S. Wheaton or Nancy S. Wheaton."

The petition was filed in probate, and thereto the defendant demurred on the grounds: (1) That plaintiff was related to deceased Nancy S. Wheaton by affinity only, and therefore was not her heir; (2) that Kate Eva Hatton never became possessed, during her lifetime, of any of the property or her interest therein, and for this reason the right of plaintiff to a distributive share never attached; (3) that the children of Kate Eva Wheaton, upon her death, took her interest, not through the mother, but through their grandmother, Nancy S. Wheaton; (4) that under the will Nancy S. Wheaton took the property absolutely, and the children of Kate Eva Wheaton took by descent the share their mother

would have inherited, and not under the will; (5) petitioner does not show that he has any right, title, or interest in the estate of the testator or Nancy S. Wheaton; and (6) is not entitled to the relief demanded or any relief. The court sustained all the grounds of the demurrer, except the fourth, and that was overruled.

Though the defendant appealed, he has not supported the alleged error by argument, and for this reason it is not considered.

I. The plaintiff was not related to Nancy S. Wheaton, deceased, otherwise than as husband of her daughter, Kate Eva Hatton, and therefore was not her heir. For this reason, defendant, as administrator, could not properly have listed him as an heir. Sections 3411, 3412, Code.

1. ESTATES OF
DECEDENTS:
heirs: listing.

II. If some of the real estate owned by J. S. Wheaton remained after the death of the life tenant, it belonged to the remaindermen, and the administrator of the life tenant acquired no interest herein through his appointment as such. The same is true of any real estate acquired by the life tenant out of the proceeds of property left by the testator, J. S. Wheaton. Title to real estate passes to the heirs or devisees upon the death of the ancestor or testator (*Herriott v. Potter*, 115 Iowa, 648), and save when there is no one entitled thereto present and competent to take possession, the administrator has nothing to do with the realty of his decedent. Section 3333, Code; *Valley National Bank v. Crosby*, 108 Iowa, 651; *In re Pitt's Estate*, 153 Iowa, 269. The petition contains nothing indicating that defendant, as administrator, has or claims any interest in the real estate left by either his decedent or the testator, J. S. Wheaton, and therefore the title thereto cannot be adjudicated, in the absence of necessary parties, even if relief of this kind were demanded; and, as seen, none was prayed. See *Todd v. Crisman*, 123 Iowa, 693.

2. SAME: wills:
remainders.

III. As plaintiff was not entitled to any portion of the

estate of Nancy S. Wheaton, deceased, as heir or otherwise, the defendant, as administrator, rightly declined to recognize him

in the distribution thereof, but instead turned
 3. **SAME:** descent and distribution: heirs: title to real estate.
 over to his children whatever their mother would have inherited, had she survived decedent.

Whether plaintiff was entitled to take a third of what was left his wife, Kate Eva Hatton, under the will of J. S. Wheaton, was of no concern to defendant, save as this might be demanded of him because in his possession. But no such claim is to be found in the petition.

The recovery of property is not sought. The prayer is that plaintiff be listed as an heir for the purpose of showing him entitled to a third of what his wife was entitled to under the will of J. S. Wheaton, deceased. As said, this was rightfully refused, for that he was not an heir of defendant's decedent, and it was no part of defendant's duty to list the heirs of another estate.

If defendant was entitled to one-third of the one-fourth of the realty left by the testator, of which the life tenant acquired with the proceeds of the property which was owned by him, the probate court is not the forum in which to settle title thereto, nor can suit for that purpose be maintained without bringing in the necessary parties. *Todd v. Crisman, supra.*

Whether the estate of J. S. Wheaton has been settled, or, if not, whether an executor was appointed instead of Nancy S. Wheaton upon her decease, is not disclosed in the petition;

4. **SAME:** distributive share: action: parties.
 but this is not material, for recovery of property belonging to that estate from the defendant is not demanded. Of course, if he has

property of the J. S. Wheaton estate, though it were in possession of the life tenant, he is accountable to the executor therefor or to the legatees or those claiming under them. In any event, it is doubtful at least whether the probate court is the proper forum in which to sue therefor. See *Stewart v. Lohr*, 1 Wash. 341, (25 Pac. 457, 22 Am. St. Rep. 150).

And it would seem that those adversely interested should be made parties. Manifestly, the real controversy is whether the share of the property left by the will to Kate Eva Hatton belongs entirely to plaintiff's two children, or one-third thereof to him and the remainder to them. On that proposition, they should have the opportunity of being heard. It follows that plaintiff was not entitled to the relief sought, and the court rightly sustained the demurrer on the first and last grounds. Though the third ground has been ably argued on both sides, we refrain from considering the point for the reason that it is not involved in the relief prayed, and the real parties in interest are not before the court.—*Affirmed.*

B. TAIT, Appellee, v. ROBERT B. REID and EFFIE N. REID,
Appellants.

Real property: CONTRACTS: ASSIGNMENT: EFFECT. A vendor's interest in a contract for the sale of land is assignable; and its assignment carries with it and vests in the assignee all of the rights of the assignor, including the right of forfeiture.

Same: FORFEITURES: BURDEN OF PROOF: EVIDENCE. Forfeitures are not favored in law; and the party seeking to enforce a forfeiture has the burden of proving such facts as, under the terms of the contract, will entitle him thereto.

Same: FORFEITURE: EVIDENCE. Default in the payment of taxes, failure to make payments provided in the contract promptly and to perform conditions regarding insurance, existing at the time notice of forfeiture was served, will authorize enforcement of a forfeiture provision, either at the suit of the vendor or his assignee.

Same: WAIVER. Where the assignee of the vendor's interest in a land contract diligently notified the purchaser of his default, and that strict performance would be insisted upon, he did not waive his right of forfeiture by refusing partial performance.

Appeal from Cedar Rapids Superior Court.—HON. C. B. ROBBINS, Judge.

THURSDAY, FEBRUARY 20, 1913.

THIS action is to recover the possession of land sold under contract, on the ground that the contract has been forfeited by failure to perform its conditions.—*Affirmed*.

Crissman, Linville & Churchill, for appellants.

Chas. D. Harrison, for appellee.

GAYNOR, J.—This action was commenced on the 2d day of November, 1910, and is brought to recover the possession of certain real estate in the city of Cedar Rapids, the possession of which defendants claim to hold under and by virtue of a contract of purchase, entered into between them and one H. G. Webster on the 10th day of April, 1907.

It appears from the record in this cause: That on the 10th day of April, 1907, H. G. Webster was the owner of the property in controversy. That he entered into a written contract with the defendants, by the terms of which he undertook and agreed to sell to the defendants all his right, title, and interest in and to the property in controversy for the sum of \$2,400, to be paid as follows: \$100 on the execution of the contract; \$200 on July 1, 1907; and the balance, \$2,100, and interest thereon at the rate of 6 per cent, per annum, payable monthly, as follows: \$20 or more, payable on or before the 19th day of each and every month from and after this date until said principal sum and interest is fully paid. Payments to be applied first on the interest then accrued, and remainder on the principal sum. "It is further agreed that the party of the second part shall also annually pay all taxes and assessments that may accrue or be levied on said property as they become due and before they become delinquent, including the taxes for the year 1907, and shall also keep the buildings, if any, on said premises constantly insured against loss by fire, lightning, tornado and wind storms, for such an

amount and in such insurance company as may be designated or approved by the party of the first part, such insurance to be written in the name of the said first party. It is hereby expressly agreed that this contract shall not be assigned by the party of the second part, or assigns, unless such assignment shall be satisfactory to and approved in writing by the party of the first part, nor the property used or permitted to be used for any unlawful purpose. It is further expressly agreed by and between the parties hereto that the time and times of payment of all said sums of money, interest and taxes, as aforesaid, is the essence and important part of this contract, and that if any default is made in any of the payments or agreements above mentioned to be made or performed by the said party of the second part, in consideration of the damage, injury and expense thereby resulting, and that may be incurred by or to the party of the first party thereby, this agreement for the sale of said property shall be void and of no effect; and the party of the second part shall have no right or claim in law or equity against the said party of the first part, nor in or to the above-mentioned real estate or any part thereof, and any claim or interest or right said party of the second part may have had hereunder up to that time by reason thereof, or of any other payments or improvements made hereunder, shall on all such default cease, determine and become forfeited without any declaration of forfeiture, reentry or any act of the party of the first part; and if the party of the second part or any other person or persons shall be in possession of said real estate, or any part thereof, he or they shall and will peaceably remove therefrom, or, in default thereof, he or they may be treated as tenants holding over unlawfully after the expiration of a lease and may be ousted and removed as such; or if after such default he or they remain in possession of said real estate with the consent of said party of the first part, they may be treated and regarded as holding said real estate as tenants at will of the said party of the first part, and their tenancy in all to said premises may

be terminated as such, and whether treated as tenants holding over after the expiration of a lease as aforesaid or as tenants at will, said party of the first part may recover possession of said real estate and every part thereof by an action for the forcible entry and detention of real property, as provided for by chapter 3 of title 21 of the Code of Iowa of 1897, and all amendments thereto; but if all said sums of money, interest and taxes are paid, as aforesaid, promptly at the time and times aforesaid, the party of the first part will, on receiving all said money and interest, execute and deliver at his own cost and expense a deed of said premises as above agreed, accompanied by an abstract showing good and sufficient title to said property in the vendor, free and clear of all liens and incumbrances. All continuations of said abstract from the date hereof until the delivery of said deed shall be paid for by the party of the second part and added to the balance due hereunder. Executed in duplicate this 19th day of April, A. D. 1907."

The plaintiff further states that said written contract was duly assigned in writing by the said Webster and wife to James E. Gow, and delivered, together with the warranty deed of the property described in the contract. That on the 2d day of February, 1910, said contract was assigned in writing and delivered by the said James E. Gow to the plaintiff herein, B. Tait, and that on or about the same time the said James E. Gow executed and delivered to the said Tait a warranty deed for said premises.

Tait brings this action, claiming that he is the owner in fee of said property and the owner of the contract entered into between the said Webster and the defendant Reid, and alleging: That the said Reid has failed and refused to perform the conditions of said contract, and has forfeited all right by reason thereof to the possession of the property in controversy in this: That he has failed to make payments on the purchase price as agreed, and failed to make the payment due October 19, 1909, and has failed to make any pay-

ment on the purchase price since that date and has failed to keep the premises insured, has failed to pay taxes before they became delinquent, has failed to pay assessments against the premises, as provided in the contract, and alleges that on November 9, 1909, he served on the defendants a notice of his intentions to declare a forfeiture of their rights under said contract. That he was put to the expense of \$1.20 for the service of said notice, and alleges that ever since the defendants have failed to comply with the terms of their contract, have failed to make the payments on the purchase price, failed to pay the taxes on the property before they became delinquent, failed to insure the premises, and failed to pay the expense of the notice of said forfeiture within 30 days of notice of said forfeiture.

Plaintiff further says that on the 10th day of May, 1910, he served on defendants a 30 days' notice to quit. Plaintiff further says that ever since the notice of October 9, 1909, the defendants have been in possession of said premises unlawfully, and he asks that he be given, not only possession of said premises, but also the value of the use of the same since said date.

The defendants, for, answer, admit that they made the contract with the Websters, as claimed by plaintiff, admit that on the 9th day of October, 1909, the Websters assigned the said contract to the said James E. Gow and executed him a warranty deed at the same time of the property in controversy, but they claim that the same was made to Gow by the Websters at the request of Tait, the plaintiff herein, and for the use and benefit of the said Tait, and this appears to be a fact from the record in the cause; and it appears from the undisputed evidence in the record that James E. Gow, on the 2d day of February, 1910, duly assigned the Webster contract to the plaintiff herein and executed to him a warranty deed of the property in controversy.

Defendants further admit that there was served on them, on the 9th day of November, 1909, a notice of forfeiture,

signed by James E. Gow, and this also appears to be a fact from the record. Defendants deny that they have failed to make the payments provided for in the contract, and deny that they have failed to keep the premises insured, and allege that they have made the payments provided for in the contract, and that the same have been received and retained by the plaintiffs.

It appears that this notice of forfeiture, served on defendants on the 9th day of November, 1909, was served by James E. Gow while he was holding the legal title to the property, and before the same was deeded to the plaintiff, and before the said Gow had assigned the contract in question to the plaintiff. Defendants therefore deny that Gow had any right to forfeit the contract, and deny that the right to forfeit, as provided in said contract, was or is assignable.

There are other matters set up in defendant's answer, but they are not material in the present consideration of the case.

There are three questions here for determination: First. Did the assignment of the contract in question carry with it the right to insist upon a forfeiture in the event of a failure on the part of the vendee therein named to perform the conditions of the contract, upon which the right of forfeiture rested? That this contract, like other contracts, is assignable is not an open question. See *Dorr v. Cory*, 108 Iowa, 725, and *Dorr v. Alford*, 111 Iowa, 278. That it carries with it and vests in the assignee all the rights of the assignor in the contract, including the right of forfeiture, follows logically from the right of assignment; and we hold that in this case the right of forfeiture provided for in the contract between Webster and the defendant vested in the grantees of Webster upon the assignment of the contract to them.

The second question is: Does the evidence show such a violation of the terms of the contract on the part of the de-

1. REAL PROP-
ERTY: CON-
TRACTS: assign-
ment: effect.

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1. REAL PROP-
ERTY: CON-
tracts: assign-
ment: effect.

defendants that, under and by virtue of the terms of the contract, the assignee of the contract might insist on a forfeiture? We recognize the rule that has been frequently announced, that the law abhors a forfeiture, and should be strictly construed against the party seeking the forfeiture.

2. SAME: for-
feitures: bur-
den of proof:
evidence.

The burden of proof rests on the party seeking forfeiture to show the existence of the facts upon which he predicates his right to forfeiture, and which, under the terms of the contract, entitled him to declare a forfeiture. Has the plaintiff done this?

It was stipulated in the contract that a failure to pay the taxes when due, and before they became delinquent, including the taxes of 1907, a failure to pay the sums agreed to be

3. SAME: for-
feiture: evi-
dence.

paid on the purchase price of the property promptly and at the time therein specified, shall cause the agreement to be void and of no effect; and that if default be made in any of the conditions of the contract all rights under the contract, given to the defendants by the terms of the contract and the agreement for the sale of the property, should be void and of no effect.

According to the terms of the contract, the defendants agreed to pay \$20 or more on the purchase price of the property on or before the 19th day of each month. The defendants paid the first two payments provided for in the contract, to wit, the \$100 payable on the execution of the agreement, and the \$200 payable on the 1st of July, 1907. They therefore became obligated to further pay \$20 on the 19th day of May, \$20 on the 19th of June, \$20 on the 19th of July, and \$20 on the 19th of August. It appears, however, that the first payment made on these monthly payments was made on the 19th day of September, and then the defendants paid to Webster the sum of \$80.

From the reading of the contract, it is not apparent what the parties meant when it says "payable on or before the 19th day of each month from and after this date," whether this

refers to July 1, 1907, or whether it refers to the date of the contract; but, for the purposes of this case, we will assume that it refers to the 1st day of July, and that on the 19th day of September all the payments required by the contract to be made were made. The next payment, however, would be due on the 19th of October. No payment, or offer to pay, this installment was made until the 14th of November. Then a check for \$20 was sent to Gow by the defendant R. B. Reid in a letter reading as follows (this in answer to a letter addressed to Gow by Reid, dated November 1, 1909): "Your communications were received in due time, but I had entirely too much to do to answer sooner. In the first place I have receipts from Webster paid to November 19, 1909. I have been looking for the last receipt but have not been able to locate it. If I am mistaken, of course, I will make it right, but I made a note of it in my memorandum that the next payment would come Nov. 19, 1909. I inclose you check for \$20.00 for the next payment. . . I will get the taxes taken care of as soon as possible."

It appears from the record that the statement made by the defendant Reid, of November 14th, was not true; that he had made no payments upon the contract since September 19th; and that the time he wrote this letter and sent this \$20 he was in default for the October payment. It appears, without dispute, that between the time of the writing of the letter by Gow to Reid, dated November 1st, and the sending of the letter by Reid to Gow, dated November 14th, and on the 9th day of November, 1909, the said Gow caused to be served on the defendants notice of forfeiture. It further appears that on the 22d day of November the check for \$20 sent by Reid to Gow, inclosed in the letter dated November 14th, was returned to Reid, with the statement that the writer was informed by Mr. Webster that he (Reid) was not correct in his statements as to the number of payments he had made, and that the check was not signed in such a way as to be acceptable to the payee therein named. Thereafter nothing was remitted

by Reid on the contract, except the sum of \$52, which was sent in a letter addressed to James E. Gow, dated December 3, 1909, which draft was returned to defendant in a letter addressed to him at North Platte, Neb., dated December 7, 1909, which reads as follows: "Cedar Rapids, Dec. 7, 1909. R. B. Reid, Esq., North Platte, Neb.—Dear Sir: Yours of the 3rd inst. inclosing check on the McDonald State Bank dated Dec. 3rd, 1909, signed by E. M. Reid, payable to myself or bearer for \$52.00 for two months back payments on your contract of purchase and \$12 for insurance, is received. Inclosed herewith I return you this check. I will not receive checks on a bank in Nebraska signed by some one else than the writer of the letter. Send remittance by draft, and the amount you remitted is not sufficient to cover the amount due, including the cost of service of the notice, which is \$1.00, and for the further reason that you have not complied with the terms of your contract of purchase for the property involved, and if you do not comply with it within the proper time your rights will be forfeited. Yours truly, Jas. E. Gow."

It further appears that on the 19th day of January, 1910, the defendants again sent to Gow a check for \$20, which was returned to the defendants in a letter reading as follows: "R. B. Reid, Esq., North Platte, Neb.—Dear Sir: Your letter of January 19th, 1910, inclosing draft No. 18723 dated Jany. 10th, 1910, issued by the Custer National Bank of Broken Bow, Nebraska, to the Omaha National Bank of Omaha, Neb., for \$20.00, which draft is payable to R. B. Reid, has been received. Inclosed herewith I return you this draft. I also returned the check on the McDonald State Bank of North Platte referred to in your letter. I return you this draft for the same reason I returned the check, and that is because you have violated the terms of your contract for the premises commonly known as No. 514 N. 17 St., in the city of Cedar Rapids, Iowa, and have forfeited all of your rights under that contract, and I shall soon commence proceedings for possession of the property. Yours truly"—

which letter was inclosed in an envelope addressed in typewriting to "Mr. R. B. Reid, North Plate, Nebraska," postmarked "Cedar Rapids, Iowa, Jan. 27, 4 P. M.," and on the upper left-hand corner, in typewriting, appears the following: "After five days return to James E. Gow, 315 15th St., Cedar Rapids, Iowa." It appears further the letter so inclosed was not signed. Thereafter nothing was done by defendants, and no further effort made by them to perform the conditions of their contract.

The following concession was made by the defendants on the trial of this case in the district court: "It is conceded that the city and county taxes due and payable during the year 1909 on the premises described in the contract, being the premises in controversy, became delinquent and were unpaid and the property sold for taxes at the regular tax sale in the fall of 1909, and that all taxes for 1909 became delinquent April 1, 1909." It was admitted by the defendant, on cross-examination, that he had not paid any taxes since September, 1909.

It appears from the foregoing that at the time the notice of forfeiture was served, to wit, November 9, 1909, the right of forfeiture on account of failure to perform the conditions of the contract was complete, in that the defendants had failed to pay the taxes and assessments against the property, had failed to make the payments provided for in the contract promptly and at the times therein stated, and had failed to perform the conditions touching insurance, as required by the contract; and we hold that the record shows that at the time of the service of the notice of forfeiture the right existed in the plaintiff, or his assignor, to declare and insist upon such forfeiture.

The next question is: Did the plaintiff and his assignors, by their conduct, waive their right to insist upon forfeiture on account of conditions broken? It appears
4. SAME: that while the property was owned by the
 waiver. Websters, and prior to the 19th day of September, 1909, Mr.

Webster had served a thirty days' notice on the defendants of intention to forfeit the contract in question, and that the thirty days had elapsed before the payment of the \$80 by the defendants to Webster on September 19, 1909; and it appears that the defendants then knew and were reminded of the terms of the contract, and that if they did not comply with the terms of the contract steps would be taken to forfeit their rights in the contract, although Webster did not insist upon a forfeiture under this notice and waived his right to forfeiture by accepting the \$80.

It appears that when the next payment of \$20 was due on the 19th of October, 1909, the defendants again failed to make the payment required to be made on that date, and that on November 1st James E. Gow notified them of this fact; and it appears that they failed to respond thereto until November 14, 1909, when they sent the letter hereinbefore set out, in which they wrongfully or mistakenly claimed to have paid up to November 19, 1909, whereas, in fact, they had only paid up to September 19, 1909, and in this letter they inclosed a check for \$20 only.

It appears that prior to this letter, November 14, 1909, and on October 13, 1909, James E. Gow had written to the defendants the following letter: "Cedar Rapids, Iowa, Oct. 13, 1909. Mr. R. B. Reid, N. 17th St., City—Dear Sir: I have today purchased Mr. H. G. Webster's contract with you. I understand that you are paying \$20 per month including interest. As per this contract, your next payment will be due Oct. 19th, and I hope you will make your payment on that date. I notice also that the taxes for 1908 are past due, and are now delinquent; amount \$32.95. Kindly take care of these at once. I also notice that there is a paving tax of \$145.73. My understanding is that you are to take care of this as it becomes due and before it becomes delinquent. My residence is 313 15th St., and you can either leave the money with me or mail me a check for the payments due on the contract. The amount due under your contract is \$1,807.89 plus

1908 taxes and special assessments for paving. Yours truly, James E. Gow." To which letter the defendants made no response, except as found in the letter dated November 14, 1909.

It appears further: That on the 9th day of November, 1909, there was served on the defendants a notice to terminate the contract, dated and signed October 23, 1909, which reads as follows:

To Effie N. Reid and R. B. Reid:

You and each of you are hereby notified that I am the owner of the contract signed by you as party of the second part and by H. G. Webster and E. M. Gertrude Webster, parties of the first part, on April 19, 1907. The contract relates to the purchase and sale of the rear 35 feet of lots one and two (1 & 2) in block 5 of Central Park addition to the city of Cedar Rapids, Iowa, as the same is known and designated on the recorded plat thereof, less the southwesterly 10 by 35 feet of lot 2, block 5, which is reserved for alley purposes. The contract was assigned to me October 9, 1909, and you are hereby notified that I intend to forfeit your rights under that contract of purchase because you have failed to make payments as provided for in the contract and because you have failed to pay the taxes and assessments as provided in the contract.

Dated and signed October 23, 1909. James E. Gow.

Served at Lincoln, Nebr., Nov. 9th, 1909.

Exhibit 4.

In the Superior Court of Cedar Rapids, Linn County, Iowa.

Thirty Days' Notice to Quit.

B. Tait, Plaintiff. Robert B. Reid and Effie N. Reid, Defendants.

That the defendants made no response to said notice, and no effort to perform the terms of the contract thereafter, until November 14th, and then only as shown in that letter hereinbefore set out.

From this it appears that the plaintiff at least was diligent, and that it was kept before the minds of the defendants

at all times that unless they performed the contract strictly and upon the terms of the contract, their rights under the contract would be forfeited. Defendant, in his testimony, says: "I was familiar with the terms of the contract, and knew that if I did not comply with it steps could be taken to forfeit my rights. I had no reason to think that, in case Mr. Gow was the real party in interest he would not forfeit the contract. I have paid no taxes on the property either during the year 1909 or 1910. I did not pay the expense of serving notice of forfeiture although there was mention made of it in one of the letters. I have lived in and occupied the premises in question since May, 1907."

It appears therefore that the defendant knew the terms of this contract and that the same could be forfeited; that he had no reason to believe it would not be forfeited if he failed to perform the conditions upon which the right of forfeiture rested; knew when the several payments were due as provided in the contract; and on November 9th knew that he had not made the payment due October 19th; that he had not paid the assessment or insurance or taxes, as he had agreed in his contract to do; knew that he had twice received notice of forfeiture and of the intent of his grantor and his grantor's assignees of the contract to insist on forfeiture, and never thereafter did he offer to perform all the conditions of the contract then unfilled and broken. The plaintiff was not obliged to receive checks on foreign banks, and was not required to receive partial payments, but had a right to exact full performance of all the broken conditions of the contract within thirty days from the service of the notice of forfeiture. To accept a partial performance would be a waiver of the other unperformed and broken conditions of the contract, and would have estopped plaintiff from insisting on the forfeiture; and so the plaintiff was justified in returning to the defendants all checks sent after November 9th, and in rejecting any offer on the part of defendants of any performance of the contract which did not reach the full measure of com-

plete performance. See *Davidson v. Hawkeye Insurance Co.*, 71 Iowa, 536, in which it is said, in the second division, on page 536: "It was the right of the plaintiff to insist on the whole payment. The contract provided that time was the essence of the agreement, and that all payments made might be forfeited if the buyer made any default. The plaintiff could not be allowed to accept partial payment, and at the same time insist that, the payment being only partial, the contract is forfeited, and the partial payment forfeited too. The very act of accepting partial payment was a waiver of strict performance as to the balance of that payment." This language is applicable to the facts in this case, and justified the plaintiff in refusing to accept the defendants' offers on November 14th, December 3d, and January 19th, and was therefore no waiver of the right of forfeiture on the part of the plaintiff.

We find no error in the record justifying reversal, and the case is *Affirmed*.

PEARL E. HARRISON, et al., Appellees, v. WILLIAM F. LANGFITT, JOSEPH H. LANGFITT, Appellees, JOHN W. LANGFITT, Appellant.

Wills: CONSTRUCTION: REVOCATION OF DEVISE. The testator by his original will gave his estate to his lawful heirs in equal shares, except one who was to receive \$400 less than the others, he having previously received that amount in land; and in a codicil he stated, "I desire to change the will in regard to J. W. Langfitt, he having received his share in land under value." *Held*, that it was the intent of testator that such heir should take no part of the estate, the amount received in land being of such value that he had already had his share; and that the form of the bequest in the codicil being expressed as a wish or desire did not defeat it.

Appeal from Dallas District Court.—HON. W. H. FAHEY, Judge.

THURSDAY, FEBRUARY 20, 1913.

ACTION of partition of real estate. All the parties are beneficiaries, or alleged beneficiaries, of the will of J. F. Langfitt, deceased. The only controversy in the case is whether the defendant J. W. Langfitt takes any interest in the real estate under such will. This question involves a construction of the will and codicil thereto. The finding of the trial court was adverse to the claim of J. W. Langfitt in that regard, and he has appealed.—*Affirmed.*

D. H. Miller, for appellant.

White & Clarke, for the plaintiffs and defendant Russell, administrator, appellees.

EVANS, J.—John F. Langfitt died testate in January, 1911. He executed his will in February, 1890, as follows:

February 24, 1890. This is to certify that I, John F. Langfitt, being in good health and sound mind, I make this will for the benefit of Sarah E. Langfitt, my wife. I give her full control of all the incomes on my real estate to use for her comfort as long as she remains my widow, I will to her all of the household goods, to use as she sees fit. I give her full control of all the personal property, farming utensils and all proceeds of from all the place and I give her full power to sell all the loose property on the place, pay all debts against the estate. I will give her power to hold any stock or grain on the place that she sees fit, all taxes on the place and all other debts made by my wife must be paid out of the income on the farm. I give her power to choose whom she wishes to assist her in transacting any business to be done. I give her full power to use all stated articles above while she remains my widow. I bequeath to all my lawful heirs, an equal share except J. W. Langfitt, who is to receive \$400.00 less than the other heirs, he having received that amount in land, and Eliza E. Clevenger, my daughter, she has received out of my estate all that I have allotted to her except five dollars. I

give to my lawful heirs all the real estate and personal property at the death of my wife, except those two mentioned on page first.

It is conceded of record that J. W. Langfitt and Eliza Clevenger are the "two mentioned on page first." Afterwards, on October 5, 1898, J. F. Langfitt executed the following codicil to such will:

October 5, 1898. I, J. F. Langfitt, having changed my mind, bequeath to Eliza E. Clevenger, my daughter, an equal share with the other heirs. I also bequeath to Sarah E. Langfitt, my wife, all money and credits, to be used as she sees fit. I desire to change the will in regard to J. W. Langfitt, he having received his share in land under value. J. F. Langfitt. [Seal.]

Both will and codicil were duly admitted to probate. The wife of the deceased did not survive him. The deceased had had eleven children. Those who did not survive him left children to take the share which would otherwise have gone to them. The question is, therefore, whether the real estate should be divided into ten shares, excluding J. W. Langfitt, or into eleven shares, including J. W. Langfitt, as a beneficiary. It is the contention of J. W. Langfitt that the original will by its terms clearly gave to him one-eleventh share of the estate, less \$400. He further contends that the provision of the codicil concerning him is too indefinite and uncertain in its language to change the devise made in his behalf in the original will.

The will is unskillfully drawn. We think that its real intention stands out quite prominently, nevertheless. It appears both from the will and from the codicil that the appellant had received, prior to the execution of the will in 1890, \$400 "in land." The original will charged this amount against the share which the appellant would otherwise take thereunder. Eight years later the codicil was executed. The testator purported therein to make three changes in

the original will. One of these related to the appellant, viz.: "I desire to change the will in regard to J. W. Langfitt, he having received his share in land under value." The meaning of this provision must be ascertained in the light of the entire will. The amount of real estate involved was one hundred and twenty acres. The number of children to be provided for were eleven. The land received by the appellant prior to 1890 was valued at \$400. The codicil now declares this to be an undervaluation, and that such land, so received, was in fact of such value that the appellant should be deemed as "having received his share." It was of course competent for the testator to reach this conclusion in his own mind and to be governed thereby. The appellant suggests no other interpretation of this clause, except to contend that it means nothing. In this view we cannot concur.

It is urged, also, that the provisions of the original will are clear and definite, and that therefore they should not be set aside by the indefinite provision of the codicil. The will itself is not so clear and definite as the appellant assumes in argument. The only express devise of the real estate contained therein seems, on its face, to except the appellant from its operation. If the original will stood alone, it might present to the appellant some difficulty to harmonize its provisions, so as to award to him a share of the real estate as distinguished from personal property.

It is also urged by the appellant that the codicil did not in fact change the will, but only expressed a "desire" to do so. It is well settled that mere precatory words in a will are not binding as a disposition of property. But this usually has reference to the expression of a wish or request as to the future conduct or action of other parties. But the expression of a wish or desire is by no means fatal to the form of a bequest or devise. Indeed, bequests frequently appear in just such form, and are sustained as sufficient. 1 Redfield on Wills (3d Ed.) 161. We reach the conclusion that the

real intent of the testator is ascertainable from the terms of the instrument as written.

The order of the trial court is therefore *Affirmed*.

H. R. SIEMONSMA, Appellant, v. CHICAGO, MILWAUKEE & ST.
PAUL RY. Co.

Carriers of live stock: CONTRACT FOR SPECIAL SERVICE: INVALIDITY.

The agreement of a railway company with the shippers of live-stock that if the latter would get together, or induce others to join them, and furnish sufficient stock to fill ten cars or more the company would furnish a special train for its shipment from a point in Iowa to Chicago, at rates charged for transportation in regular trains, is in violation of the Interstate Commerce Act and void; and no recovery can be had for injury occasioned by its breach.

Appeal from Sioux District Court.—HON. DAVID MOULD,
Judge.

THURSDAY, FEBRUARY 20, 1913.

FROM judgment on a directed verdict, the plaintiff appeals.—*Affirmed*.

Gerrit Klay, for appellant.

Shull, Farnsworth, Sammis & Stilwill, for appellee.

LADD, J.—The petition was in two counts. In the first plaintiff claimed damages because of unreasonable delay in the transportation of cattle from Rock Valley to Chicago, Ill. The evidence in support thereof was the same as that reviewed on the former appeal and held insufficient to sustain the allegation (*Siemonsma v. Railway*, 137 Iowa, 607), and therefore as to this issue, the verdict was rightly directed.

In the second count, plaintiff alleged that he, his brother, R. Siemonsma, and S. W. Van der Wonde entered into an oral agreement with defendant's agent that if they "would get together or induce others to join them and deliver live stock in sufficient numbers at one time to fill ten cars or more at Rock Valley, to defendant for transportation to Chicago, Ill., defendant would furnish a special train;" that, in pursuance of such agreement, they delivered to defendant in its cars intended therefor, July 3, 1905, two hundred and forty-three head of cattle for such transportation and to be sold at the Union Stockyards in Chicago, Ill., on July 5th following; that said cattle were loaded in fourteen cars at about 6 o'clock p. m. and train made up with engine attached and ready to start when they were required by the station agent to sign shipping contracts, which they did without reading and supposing the provision for special train was inserted therein; that, had said cattle been transported by special train, they would have reached the stockyards in time for the Wednesday, July 5th, market and before noon of that day; that instead defendant did not carry by special train, and as a consequence the cattle did not reach the stockyards until the morning of the next day, and, through shrinkage and fall of price, the shippers were damaged in the sum of \$1,035, for which sum plaintiff, to whom R. Siemonsma and Van der Wonde have assigned their claims, prayed for judgment. The evidence disclosed that the special train left Rock Valley at 6:40 p. m., but when it reached Sanborn the cars were transferred to a regular freight train in which they were hauled to Chicago, Ill.; the cattle being unloaded for rest and feeding en route at Savannah, Ill. Whether there was an agreement to haul by special train beyond Sanborn was in dispute, but the jury might so have found, and that had a special train been furnished the entire way that the cattle would have reached the stockyards for Wednesday's market. If then the oral agreement was valid and was not superseded by the written contracts, it would seem that a case was made

out for the jury. The written contracts in no wise related to whether the cars should be hauled by special train, and it may well be doubted whether these, under the circumstances, should be construed to supersede or in any wise affect the alleged oral agreement.

But we prefer to put our decision on another ground, for that it finally disposes of the case, even though not suggested on the trial nor in this court save in oral agreement. The trial court held the oral agreement not binding on defendant because of the subsequent written contracts of shipment, and that the agreement, if made, was invalid, is only a better reason for a correct ruling.

The oral arrangement, if as alleged, was but a contract for a preference in the shipper's favor, a discrimination prohibited by the federal statutes in the clearest terms. By the third section of Interstate Commerce Act Feb. 4, 1887, chapter 104, 24 Stat. 379 (U. S. Comp. St. 1901, page 3156), it was made unlawful to give any undue or unreasonable "preference or advantage" to any particular person or to subject any particular person to "any undue or unreasonable prejudice or disadvantage in any respect whatever." Carriers like defendant are by the sixth section of the act to keep posted for public inspection printed schedules showing rates, charges, and classifications, and "any rules or regulations which in any wise change or affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The same section also provides as follows: "And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

By the act of February 19, 1903, known as the Elkins

act, amending the act of 1887 (32 Stat. 847, chapter 708 [U. S. Comp. St. Supp. 1911, page 1309]), it is made "unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive, any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced." In speaking of this act, Mr. Justice White, in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391 (26 Sup. Ct. 272, 277, 50 L. Ed. 515), said:

It cannot be challenged that the great purpose of the act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is therefore entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught, whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied.

The manifest purpose of these federal statutes was to compel the carrier, as a public agent, to give like treatment to all, and little argument would seem necessary to show that to an undertaking to carry one shipper's cattle by special train at the same rate or tariff exacted from another routed

on schedule time would be violative of the spirit as well as the letter of the law. The Supreme Court of the United States, however, has passed on the precise question now before us in *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155 (32 Sup. Ct. 648, 55 L. Ed. 1033). Kirby was engaged in shipping horses from Springfield, Ill., to New York City, and entered into a contract with the railroad company to carry a car load of horses at schedule rates from Springfield to Joliet in time to deliver the following morning so that it would be carried by the fast stock train known as the "horse special" over the M. C. Railroad through to New York. Connection was missed, and transportation delayed to the shipper's damage. In holding that the contract was invalid, the court, speaking through Lurton, J., said:

The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when that action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract. For such a special service and higher responsibility it might clearly exact a higher rate. But to do so, it must make and publish a rate open to all. This was not done. The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence. An advantage accorded by special agreement, which affects the value of the service to the shipper and its cost to the carrier, should be published in the tariffs; and for a breach of such a contract relief will be denied, because its allowance, without such publication, is a violation of the act. It is also illegal because it is an un-

due advantage in that it is not one open to all others in the same situation.

See, also, *Winn v. American Express Co.*, 149 Iowa, 259.

This reasoning seems unanswerable, and it necessarily follows that the oral agreement is invalid, and that recovery might not be had for any injury occasioned by its breach. The verdict for defendant was rightly directed.—*Affirmed*.

NANCY E. RANKIN, Appellee, v. W. W. RANKIN, as Executor of the Will of A. W. Rankin, Deceased, Appellant.

Estates of decedents: ALLOWANCE TO WIDOW: YEAR'S SUPPORT. The allowance to a widow for her year's support is a matter within the sound discretion of the court, and its action will not be disturbed on appeal unless it is made to appear that such discretion has been abused. In the instant case an allowance of \$500 is upheld, where it appeared that the estate was worth \$10,000 above all debts, although the widow owned a small estate in her own right.

Appeal from Davis District Court.—HON. F. M. HUNTER, Judge.

THURSDAY, FEBRUARY 20, 1913.

APPEAL by the executor of the will of A. W. Rankin, from an order allowing the widow of the testator the sum of \$500 for a year's support.—*Affirmed*.

W. W. Rankin and Payne & Goodson, for appellant.

H. C. Taylor and C. W. Ramseyer, for appellee.

WEAVER, C. J.—The petition of the widow shows that she is sixty-four years of age; that the deceased left no minor children; that his estate is of the value of \$30,000; that she

has no estate of her own, except forty acres of land, the net income from which is only \$20; and that for her proper support and maintenance the sum of \$600 is reasonably required. For this amount she asks an allowance from the estate of her husband. The defendant, resisting said application, denies that the estate is of the value \$30,000, and estimates such value at \$10,000. He further denies that the widow's income from the land is as alleged by her, and avers that such income is from \$125 to \$150, and that she has ample property for her own support and maintenance.

The evidence tends to show that the testator left an unincumbered estate, amounting to at least \$10,000 over and above debts and liabilities. The widow is shown to have forty acres of land, leased at an annual rent of \$60. She also has not to exceed \$300 in money. She was the second wife of the testator, and had lived with and cared for him for a considerable number of years before his death. Since his death, she has made her home with her children of a former marriage. She has paid nothing for her board with these children, but expresses her desire to do so. She is in feeble health, and unable to support herself by manual labor. Concerning the rental value of the widow's forty acres, the executor and his witnesses say it is worth \$3 per acre annually. It appears, however, that \$100 is the highest yearly rental it has ever returned, and that for the last two years it has been let at \$60 per year. Out of this she is required to pay taxes and repairs.

Upon the foregoing showing, the trial court awarded the widow \$500 as her statutory allowance for a year's support, and the executor appeals. The appeal is wholly without merit.

The application for a widow's allowance is addressed to the sound discretion of the trial court, and will not be disturbed on appeal, unless it be made clearly to appear that such discretion has been abused. *Rice's Estate*, 146 Iowa, 48; *Busby v. Busby*, 120 Iowa, 536; *Dewell's Estate*, 88 Iowa, 14; *Newans v. Newans*, 79 Iowa, 32; *Peet's Estate*, 79 Iowa, 185.

There is here not the slightest showing of an abuse of discretion. That an estate of \$10,000 or more, after all general claims have been met, should be required to contribute \$500 for a year's support of an aged and infirm widow is certainly not a startling or even extraordinary exercise of judicial power. It has been too often decided to justify citation or quotation of precedents that this allowance is not a mere charity to stand between the widow and absolute privation. That she has a small estate of her own is no reason for denying it. The estate owes her a year's support, if the court shall so order, and, while that support should not be extravagant or wasteful, it is not to be limited to the bare necessities of food, drink, and clothing. Whatever is reasonably necessary to keep her for a year in the station in life in which her marriage had placed her, and is not out of just proportion to the property left by the deceased, is a necessity, within the meaning of the statute. Code, section 3314.

The fact that the widow's children are willing to take her into their homes without exacting of her a promise to pay for the food she eats at their tables, or for the bed in which she sleeps under their roof, is not a matter for which the executor can be allowed credit in meeting this obligation. Neither can he rightly demand that she shall consume her small savings in providing for herself that which, under the statute and the order of the court, he should provide her with from the estate. Counsel speak of the order appealed from as a taking of the money of the heirs to pay the claims of the widow. Such is not the fact. The heirs have no title to or claim upon a dollar of the estate, except such part of it as may be left, after all legal charges, including the claim for widow's support, have been met and satisfied. That their residue may not be unduly depleted, they may properly insist that the allowance be no more than is reasonable; but the record before us discloses no ground for such objection in this case.

The order has ample justification, and it must be affirmed. This conclusion being reached on consideration of the merits of the case, we do not pass upon the appellee's motion to affirm, because of the failure of appellant to comply with our rules in relation to printing abstract. Appellant's motion to strike amended abstract, because not filed in time, is overruled.—*Affirmed.*

B. SPARKS, Appellee, v. THE SPAULDING MFG. CO., et al.,
Appellants.

Accord and satisfaction: SETTLEMENT: TENDER: ACCEPTANCE: EFFECT. Where there was a good faith dispute and disagreement as to the amount due on an unliquidated claim, a tender of a certain sum in full settlement and liquidation of the claim must be either unconditionally accepted or rejected. The acceptance and crediting of a sum tendered in full payment on the amount claimed will constitute an accord and full satisfaction.

Appeal from Poweshiek District Court.—HON. K. E. WILCOCKSON, Judge.

THURSDAY, FEBRUARY 20, 1913.

ACTION to recover compensation for work and labor performed by plaintiff about the foundation of a building belonging to defendant Spaulding Manufacturing Company, a co-partnership. Defendants admit that plaintiff performed some work for them in preparing the ground for the foundation of a building, but pleaded payment and an accord and satisfaction. On these issues, the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendants appeal.—*Reversed.*

A. C. Lyon and W. R. Lewis, for appellants.

J. H. Patton, for appellee.

DEEMER, J.—Under an agreement which did not fix the rate of compensation, plaintiff performed some work for the defendants in preparing the ground for the foundation of a building, which defendants proposed to erect. As the price for the work was not fixed, a controversy arose upon its completion, and plaintiff commenced this suit to recover the amount he claimed to be due. He introduced testimony tending to show the value of his services; but defendants relied upon their plea of payment and accord and satisfaction, and now insist that the trial court erred in submitting the case to the jury, and in its instructions with reference to these issues. As the amount of plaintiff's compensation was not fixed, and a good-faith dispute arose between him and the defendants as to the amount due, it was competent for the parties to fix the amount due or to agree upon a settlement, and, if they did so, either expressly or by necessary implication, and defendants paid plaintiff the amount so fixed or agreed upon, then plaintiff cannot recover, for there was an accord and satisfaction. Whether or not there was a payment or an accord and satisfaction was primarily a question of fact for the jury. But these may become questions of mixed law and fact for the court, and defendants counsel insist that this was the fact here, because the testimony, with reference thereto, is almost wholly in the form of letters. The trial court submitted these issues to the jury, and the verdict was for the plaintiff.

We here set out the material parts of the testimony bearing upon these propositions. Plaintiff testified as follows:

The first time I told Mr. Spaulding what he owed me was when I went back. I said if I was going to take \$400 there was \$160 back. He said he would only pay \$15 a day. I said, 'Mr. Spaulding, I can't take it;' and got up and left him. On the way over to get this \$100, he asked me what was right, and I told him, if he would allow me fifty feet a day at fifty cents per foot, I would be satisfied. That would be \$25 a day. . . . When Spaulding gave me the \$100 check,

he did not say he would pay me the balance as soon as my time was made out. He asked me if I wouldn't take a check for \$100 and come around in a few days and get the rest. He wanted to see the boys. I suppose he meant his boys. I came back in a few days; but we could not agree as to the amount due. He said \$15 a day was enough. I would not take it, I wanted \$25 a day. We did not agree on any settlement.

One of the defendants said with reference to this matter:

After the work was completed, Mr. Sparks came to me and told me he was through. I told him, 'As soon as Mr. Hayden can get the time, you come in, and we will pay you; and, if you need any money now, I will pay you.' He said he would like \$100, and I went in and gave him a check for \$100. In a day or two he came in. . . . Then I asked Mr. Sparks, 'Now, what is the bill?' . . . He said he would charge \$400, \$25 a day. I looked at him and said, 'You are joking.' 'No,' he said, 'I mean it.' He said he had lost the digging of a great many wells. He could only name two thirty-foot wells. I told him I would give him \$15 a day. He said he would not take it. I told him I was sorry we could not agree. He got up to go, and I told him any time he came back we were ready to settle. The next thing I knew we had a letter from Mr. John Patton that he had it in his hands for collection. . . . I fixed the terms for a settlement, for I knew it was all he was worth. I didn't offer to settle on any other terms. I do not want to settle on any other terms. . . . I thought Mr. Sparks was joking when he asked \$400 for his work. I had men who did the same work and more for \$1.90 per day.

The letter from Patton, referred to in the testimony of this defendant, reads as follows:

Grinnell, Iowa, September 28, '10.

Spaulding Manufacturing Company, Grinnell, Iowa—
Dear Sirs: Bart Sparks has placed in my hands for adjustment a difference which seems to exist between you and Mr. Sparks, relative to his compensation for boring or digging holes in connection with the foundation for your new building. Mr. Sparks says his charge amounts to \$400.00; that

you have paid him \$175.00, leaving \$225.00 still due. Mr. Sparks informs me that Mr. H. W. Spaulding offered Mr. Sparks what would amount to \$240.00 for his work, being based on \$15.00 per day. This Mr. Sparks says is not enough and that he will not settle on that basis. Judging from what Mr. Sparks has said to me, it may be that you folks have got beyond the period of negotiation; if so, you are perhaps up to the line of litigation. I have no disposition to crowd the matter to a lawsuit, and I do not think Mr. Sparks wants me to do anything else at this time than to get from you the amount he claims due without suit, unless the latter is made necessary by a refusal to pay. Hoping to hear from you soon, I am, Yours truly, J. H. Patton.

This was responded to by defendants' counsel, Mr. A. C. Lyons, as follows:

October 4, 1910.

J. H. Patton, Atty., Grinnell, Iowa—Dear Sir: Your recent letter regarding the claim of Bart Sparks has been referred to me for attention. I will try to see you shortly regarding it. Yours truly, A. C. Lyon.

To this Patton responded, saying:

Grinnell, Iowa, Oct. 10-10.

A. C. Lyon, Att'y at Law, Grinnell, Iowa—Dear Sir: Mr. Bart Sparks is urging me for an answer with reference to his claim against the Spaulding Manufacturing Company. I would like to take this matter up with you within a day or two. I also want to talk with you about a claim William Prentis has against the Spaulding Manufacturing Company. Yours truly, J. H. Patton.

This was followed by a letter reading:

Oct. 11, 1910.

Mr. John H. Patton, Grinnell, Iowa—Dear Sir: Carrying out our conversation of this morning regarding Bart Spark's claim, we are sending you herewith our check for \$40.00 payable to his order, which is the balance due him for work done by him and his men on the foundation of our new building. We regard this as an extremely liberal payment for the time employed and the work done, and in the writer's judgment it is much more than would be considered rea-

sonable under the circumstances. We are sending this to you at this time in the belief that you will advise its acceptance and for the reason that the writer is to be out of town a week or so, and we do not wish to keep Mr. Sparks out of any money which we think is due him. Very truly yours, Spaulding Manufacturing Co., by A. D. Lyon. ACL H—ENC.

Patton then wrote this:

Grinnell, Iowa, Oct. 19-10.

Spaulding Manufacturing Co., Grinnell, Iowa—Dear Sirs: Yours of the 11th instant inclosing check for \$40.00 payable to the order of B. Sparks received. I have delayed answering awaiting an interview with Mr. Sparks, which I had to-day. He declines to accept the \$40.00 in settlement of his claim, but acting upon my advise he retains the \$40.00 and credits same on his account against you. As I understand the matter you have now paid him in cash \$215.00 and \$25.00 in a buggy, making a total payment of \$240.00. Mr. Sparks insists upon being paid \$400.00. This leaves a difference of \$160.00 between you, and Mr. Sparks has instructed me to bring suit for this balance at once if not paid. I assume from your letter that you consider you have paid Mr. Sparks liberally for the work he did, and that perhaps you will decline to pay more voluntarily. I will take the initial steps to an action, but will be pleased to stop or dismiss the same at any time you and Mr. Sparks can agree upon a settlement. Yours truly, J. H. Patton.

And to this defendant responded as follows:

Oct. 28, 1910.

Mr. J. H. Patton, Grinnell, Iowa—Dear Sir: The writer has just returned home from a business trip and your letter of October 19, regarding Bart Spark's claim, was received in due course. If Mr. Sparks does not desire to receive and accept the money which we sent him in our letter of October 11th on the terms and conditions under which it was sent, he had better return the money to us at once. Of course if you desire to bring suit on a claim which is in the condition which this claim is, you are at perfect liberty to do so, although it seems to the writer that the proposition on which it is based is an absurd one. That, however, is for Mr. Sparks

to decide, or rather for you to decide for him. We note that you say in your letter that you will be pleased to stop or dismiss the action any time we and Mr. Sparks can agree on a settlement, and in reply will say that we have had no dealings whatever with Mr. Sparks since the claim was presented by you and will have none, unless he desires to present the matter. When we have done as much as we think just and reasonable and when, as in this case, we have gone as far beyond what any one would agree was reasonable under the circumstances, we are perfectly willing to abide the consequences. Yours truly, Spaulding Manufacturing Co., by A. C. Lyon. A. C. L. H.

The check referred to in this correspondence was dated October 11, 1910, made payable to plaintiff, and cashed by the bank, upon which it was drawn after being indorsed by plaintiff and his attorney on October 22d of the same year; and the testimony shows that defendants did not know it had been cashed at the time they wrote the letter under date of October 28th. This is the entire testimony upon the issues now being considered; and, at the conclusion of all the testimony, defendant moved the court for a directed verdict. This motion was overruled and the court submitted the issue of payment and accord and satisfaction to the jury.

Among other instructions given were the following:

If you find from the evidence, guided by these instructions, that the plaintiff assented to and accepted the check for \$40 in full settlement and satisfaction of the claim sued on, then the plaintiff would not be entitled to recover of the defendants in any sum whatsoever; and, if you so find, then you should determine the issue of accord and satisfaction in favor of the defendants, and return your verdict in their favor. But if you believe from the evidence that the plaintiff, at the time of the acceptance of the said check, refused to accept or receive the said check in full payment and satisfaction of this claim against the defendants, but accepted and retained the same only with the understanding between himself and the defendants that the same should be accepted as part payment only, and not in full satisfaction, then the same would not constitute an accord and satisfaction between

the parties. With reference to the check for \$40, the defendants allege that the same was given by them and received by the plaintiff in full satisfaction of the claim of the plaintiff. The plaintiff alleges that said check was not offered, and he did not receive the same in full payment. And upon this you are instructed that the question of giving and acceptance of the \$40 check depends upon the intention of the parties; and it is a question of fact for your determination, from all the evidence in the case, guided by these instructions as to the law. The mere fact that the plaintiff accepted the \$40 and converted the money to his own use and benefit does not necessarily show that he accepted it in full satisfaction of all his claim against the defendants. But it is for you to say, under all the facts and circumstances in this case, taking into consideration the statements of the parties and the letters, all as shown by the evidence, as to whether or not the plaintiff did receive and accept the \$40 with the understanding that it was a satisfaction in full, or whether he accepted it with the understanding that it was a part payment of what he claimed the defendants owed him.

Complaint is made of these instructions and of the overruling of defendants' motion for a directed verdict, and we think the complaint is well founded.

In *Perin v. Cathcart*, 115 Iowa, 553, it is said:

But as an accord and satisfaction is an executed agreement whereby one of the parties undertakes to give, and the other to accept, in satisfaction of a claim arising either from contract or tort, something other or different from what he is or considers himself entitled to, no invariable rule can be laid down, with any degree of certainty, as to what constitutes such an agreement. Each case must be determined largely on its peculiar facts. To constitute a valid accord and satisfaction, not only must it be shown that the debtor gave the amount in satisfaction, but that it was accepted by the creditor as such. *Jones v. Fennimore*, 1 G. Greene, 134; *Weddigen v. Fabric Co.*, 100 Mass. 422. The agreement need not be express, but may be implied from circumstances, as shown in the cases just cited. Where an offer of accord is made on condition that it is to be taken in full of demands, the creditor doubtless has no alternative but to refuse it or accept it upon

such conditions. *Keck v. Insurance Co.*, 89 Iowa, 200. But, even in such a case, the debtor may consent to the creditor's receiving it on his own terms. *Potter v. Douglass*, 44 Conn. 541. *Sicotte v. Barber*, 83 Wis. 431 (53 N. W. 697); *Gassett v. Town of Andover*, 21 Vt. 342.

In *Beaver v. Porter*, 129 Iowa, 41, the trial court gave the following instruction:

To constitute an accord and satisfaction, where there is a bona fide dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to the condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. A party to whom an offer is thus made has no alternative but to refuse it or to accept it upon such conditions, and, if he takes it, his claim is cancelled.

And speaking of the rule there announced, we said:

Now, within our view, if agreement of settlement there was, it arose impliedly out of the acceptance by Alpaugh of the statement of account and check sent him, and the appropriation by him of the latter to his own use, and not otherwise. And, if there was a good-faith dispute as to the amount due, it is true, by the weight of authority, that the acceptance of the statement and check would amount, in law, to a complete accord and satisfaction. See the cases collected in 1 Cyc. 333, note, among which are the following: *Ostrander v. Scott*, 161 Ill. 339 (43 N. E. 1089); *Golden v. Bartlett Illuminating Co.*, 114 Mich. 625 (72 N. W. 622); *Eames, etc., Co. v. Prosser*, 157 N. Y. 289 (51 N. E. 986); *Washington, etc., Co. v. Johnson*, 123 Pa. 576 (16 Atl. 799, 10 Am. St. Rep. 553); *Hull v. Johnson*, 22 R. I. 66 (46 Atl. 182).

See, also, *Cartan v. Tackaberry*, 139 Iowa, 586; *Keck v. Insurance Co.*, 89 Iowa, 200; *Greenlee v. Mosnat*, 116 Iowa, 535; *Barrett v. Insurance Co.*, 120 Iowa, 184.

In the cases from which we have quoted, the court adopts the New York rule, and the doctrine obtaining in that state

is shown by the following quotations from the cases cited. In *Nassoivy v. Tomlinson*, 148 N. Y. 326 (42 N. E. 715, 51 Am. St. Rep. 695), the court said:

The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for, if he accepted at all, it was *cum onere*. When he indorsed and collected the check referred to in the letter asking him to sign the inclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was *ipso facto* an acceptance of the condition. The minds of the parties then met, so as to constitute an accord.

And in *Fuller v. Kemp*, 138 N. Y. 231 (33 N. E. 1034, 20 L. R. A. 785), the Court of Appeals of that state said:

Where the demand is liquidated, and the liability of the debtor is not in good faith disputed, a different rule has been applied. In such cases, the acceptance of a less sum than is the creditor's due will not, of itself, discharge the debt, even if a receipt in full is given. The element of a consideration is lacking, and the obligation of the debtor to pay the entire debt is not satisfied. There are many authorities which enforce this proposition, but they have no relevancy to a case like the present, where the debt was unliquidated; and there was a bona fide disagreement in regard to the extent of the debtor's liability. The law favors the adjustment of such controversies without judicial intervention, and will not permit the creditor to accept and retain money which has been tendered by way of compromise, and then successfully litigate with his debtor for the recovery of a greater sum. There have been some cases in our own courts where this principle has been applied; but in none that we have examined has the question arisen in the exact form here presented. *Palmerton v. Huxford*, 4 Denio, 166; *Looby v. Village of West Troy*, 24 Hun. 78; *Hills v. Sommer*, 53 Hun, 392 (6 N. Y. Supp. 469); In other states, there are many decisions directly in point, where the facts were not distinguishable from those appearing

in this record. *McDaniels v. Lapham*, 21 Vt. 222; *Preston v. Grant*, 34 Vt. 201; *Townslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 553 (5 Atl. 407); *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541; *Reed v. Boardman*, 20 Pick. [Mass.] 441; *Donahue v. Woodbury*, 6 Cush. [Mass.] 148 (52 Am. Dec. 777); *Hilliard v. Noyes*, 58 N. H. 312; *Brick v. Plymouth Co.*, 63 Iowa, 462; *Hinkle v. Railroad Co.*, 31 Minn., 434 (18 N. W. 275). In *Preston v. Grant*, *supra*, the Supreme Court of Vermont very sharply, and as we think, correctly, defined the line of discrimination which separates this class of cases from those where the defense fails. Judge Pierpont, delivering the opinion of the court, at page 203 of 34 Vt., says: 'To constitute an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he takes it, his claim is canceled, and no protest, declaration, or denial of his, so long as the condition is insisted on, can vary the result. The principle is too well settled in this state to require either argument or the citation of authorities to support it.' To make out the defense, the proof must be clear and unequivocal that the observance of the condition was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered in case he did not assent to the condition upon which it was offered. The defendant here has brought his case clearly within the rule, and is entitled to have the judgment of the general and special terms reversed, and the complaint dismissed, upon the stipulated facts.

The rule so clearly announced is applicable here. There can be no question that there was a *bona fide* dispute between the parties regarding the amount due upon an unliquidated claim; that defendants offered plaintiff a check for \$40 in full satisfaction of the claim; that plaintiff accepted and

cashed the check with knowledge that defendants were tendering it in full payment. Plaintiff's attorney wrote, saying that he declined to accept the check in full payment, and proposing to apply it on account and to sue for the balance; but defendants immediately disapproved of that plan and demanded the return of the money at once. This plaintiff refused to do, but, with knowledge of the conditions of defendants' tender, kept the money and then commenced this suit. It seems quite clear to us that plaintiff "cannot eat his cake and keep it too."

In *Johnson v. Burnett*, 17 Cal. App. 497 (120 Pac. 436), the Court of Appeals of California said:

Where a tender is made to a party to whom a debt is owing of an amount less than that which is claimed to be due, and the amount claimed to be due is unliquidated, and the party making the tender in express terms offers the payment as in full satisfaction of the disputed account, the offeree in that case is bound either to reject the offer or to accept it upon the precise terms denoted by the tender. *Creighton v. Gregory*, 142 Cal. 34 (75 Pac. 569); *Weller v. Stevens*, 12 Cal. App. 779 (108 Pac. 532). If he appropriates to his own use the amount tendered, he cannot afterwards be heard to say that he did so upon any terms other than those which the person making the offer imposed upon him.

None of the cases cited and relied upon by appellee announces a contrary rule. It follows that the trial court was in error in overruling defendants' motion for a directed verdict and giving the instructions which we have quoted.

For these reasons the judgment must be, and it is, *Reversed*.

STATE OF IOWA, Plaintiff, v. GORDON DAVIS, Defendant,
Appellant.

Criminal law: ASSAULT AND BATTERY: CORPOREAL PUNISHMENT: EVIL DENCE. On this prosecution of a school teacher for the corporeal

punishment of a pupil, the evidence is held to require submission of the question of whether the punishment was immoderate and unwarranted, and to support a finding of assault and battery. .

Same: CONFLICTING INSTRUCTIONS. Instructions in assault and battery dealing with the supposed state of facts as contended for by the state, and directing a verdict for plaintiff if such facts are found to be true; and another instruction dealing with the facts as contended for by defendant, with direction to return a verdict for him if found to be true, no complaint being made as to the correctness of either, were not contradictory in the sense that they were prejudicial to defendant.

Same: CORPORAL PUNISHMENT: INSTRUCTIONS. An instruction requiring the jury to find whether the degree of impudence and defiance of a pupil was the violation of a reasonable rule of discipline in the school, was not objectionable as requiring a finding as to what was a reasonable regulation, and whether it was reasonable to forbid saucy and impudent conduct.

Same: EVIDENCE OF CUSTOM: INSTRUCTION. Where the defendant upon the trial of the action denied that he punished a pupil for refusal to perform a certain act, but based the punishment solely upon saucy and impudent conduct in refusing to so perform, exclusion of evidence that it had been the custom to require performance of the act of the older children was not prejudicial. And the ruling excluding the evidence was not rendered erroneous by the subsequent instruction that if defendant as a reasonable man believed that he had the right to require performance of the act, and in that belief inflicted the punishment because of the refusal, he would be guilty of assault and battery; as the instruction was more favorable to defendant than he was entitled to.

Appeal from Davis District Court.—HON. F. M. HUNTER,
Judge.

FRIDAY, FEBRUARY 21, 1913.

THIS is a prosecution, upon information, for assault and battery. It was heard in the district court on appeal from a justice court. From a verdict and judgment of conviction in this district court, the defendant has appealed.—*Affirmed.*

T. P. Bence and E. Rominger, for appellant.

George Cosson, Attorney-General, for the State.

EVANS, J.—The defendant is a school-teacher. On October 24, 1910, he was engaged in teaching the public school of Pella district, in Davis county. One of his pupils was May Downing, a girl of about fourteen years of age. The defendant inflicted corporal punishment on her for alleged misconduct. Such corporal punishment is the basis of the charge of assault and battery.

I. At the close of the evidence for the state, the defendant moved for a directed verdict on the general ground of failure of proof.

There was no drinking water to be had from the school-house well. It appeared to have been the habit of the defendant to request or require the larger scholars to carry drinking water to the schoolhouse from a neighboring well forty or fifty rods distant. May Downing had been directed by her father not to carry water, on the alleged ground that the state of her health would not permit it. Two or three excerpts from the evidence will sufficiently indicate the general nature of the evidence on both sides.

1. CRIMINAL LAW:
assault and
battery: cor-
poral punish-
ment: evidence.

May Downing testified as follows:

There was no suitable water on the school grounds. Scholars had been fetching it. At last recess in afternoon, Mr. Davis wanted me and Inez Johns to fetch a bucket of water. I told him I couldn't; that father said not to. He said he did not know what he told me to do that for, and I told him he said he'd tell him when he saw him. He took me by the arm and made me go up on the floor and take my geography, and said would either go to the well or take a whipping. I told him father told me not to. He led me up on the floor. Slapped me when he was back at the side. He said them that wouldn't pack water, and drink it, was hogs. . . . He

whipped me; was angry and vicious. I don't know how many licks he gave me, twenty or twenty-five. He was talking to me when he whipped, but I do not remember what he said. The stick was three feet long. Big as my second finger. Stick bigger at one end than the other. I don't know where he got the stick. He used it for a pointer. I wasn't in very good health at the time.

W. T. Downing, the father of May Downing, testified as follows:

. . . I told my daughter she was not to carry water if he asked her, and that I would tell him why some time. I told her on the day of the whipping. I examined her when she came home. She said her back smarted. I found she had several marks. I could not state how many they crossed, several of them. Two of them on her arm, and some across her shoulder. I couldn't hardly count the licks, and some of them were bloody water. They were from a big-sized straw to lead pencil. One end of the stripe bigger than the other. Red where they crossed, and would be kind of purple. The other end would be bloody water. They were just below the neck of her dress.

The defendant testified as follows:

When I dismissed school for the last recess afternoon October 24, 1910, I looked at the list which I had, and saw that May Downing and Inez Johns were the next two on the list of large scholars to carry water. I went part of the way back to them, and said: 'May and Inez, it is your turn to get water this day.' Inez said, 'Can we take the cup along?' I said, 'Yes.' May said: 'My father said for me not to carry water, and I am not going to.' I said: 'Oh, come now, get the water and be nice about it.' She said: 'I don't have to carry water.' I said: 'Don't sass me, or I will have to punish you.' She said: 'Well, I don't have to carry water.' I said: 'You get your book and come up here.' She said: 'Well, my father said for me not to carry water, and I ain't going to stand on the floor either.' I made no answer, but waited a few seconds for her to come, but she didn't, and I went back and took her by the arm

and led her to the front. On the way to the front she said: 'My father said for me not to carry water, and I ain't going to carry it, or I am not going to stand on the floor.' I said: 'All right, May; but don't sass me, or I will punish you.' She continued the same, sassy and resistful. She said as she did before, and I said, 'Stop that back talk.' She didn't stop. I used switch. . . . Did you administer the punishment because she refused to carry water? No, sir. I punished her to stop the disrespectful talking and the sass. We were in the front near the blackboard. I think I struck her in the neighborhood of twelve times, not more than that. I never struck hard. I think she was thinly dressed. Struck her across the shoulders. She did not cry. She continued to talk while I was striking her. Inez Johns was in the room. May talked to me in a disrespectful manner. I told her to stop that sass. I did not require her to carry the water after what she said. She spoke to me in a quick, angry manner. . . .

Giving full credence to the evidence of the state, as we must do for the purpose of the defendant's motion, it tended to show that the corporal punishment was immoderate in degree, and that it was inflicted for an unwarranted cause. The fact that the evidence on behalf of the defendant tended to show otherwise did not warrant the trial court to withdraw the case from the jury. The motion for directed verdict was therefore properly overruled. The same reason must govern us in refusing to interfere with the verdict, so far as the weight of evidence is concerned. It must be said that there is much in the record to corroborate the story of the defendant; but we could not, if we would, interpose our judgment against that of the jury on the weight of conflicting evidence.

II. The principal argument is directed to the proposition that certain two of the instructions of the court, Nos. 17 and 19, were conflicting, and that such conflict was necessarily prejudicial to the defendant. Except in one respect, no complaint is made as to the correctness of either instruction. It is argued, however, that because of the conflict one or the other is necessarily erroneous. The instructions are long, and we will not

2. SAME: conflicting instructions.

set them out. It is sufficient to say that instruction seventeen purports to deal with the supposed state of facts as contended for the state, and that instruction nineteen purports to deal with the supposed state of facts as contended for the defendant. In no other sense could it be said that they are contradictory. No complaint is made of the abstract correctness of No. 17 standing alone.

As to No. 19, however, it is contended that it erroneously submitted to the jury the question of what was a reasonable rule or regulation of the school, and whether it was a reasonable rule or regulation to forbid and punish

3. SAME: corporal punishment: instructions. "sassy" talk and impudent conduct on the part of the pupil. We think the instruction is not vulnerable to this particular objection. It did not require the jury to determine what was a reasonable rule, but it required the jury to determine what the conduct of the pupil was in fact, and whether it was of such a degree of impudence and defiance as to violate a reasonable rule of discipline in the school. There was no error at this point.

III. The defendant requested an instruction which was formally refused, although much of it was contained in an instruction given by the court. We think the instruction requested was in all material respects fairly embodied in such instruction given by the court.

IV. The defendant offered evidence that it had been a long-time custom of the school to have the larger children carry the drinking water from the same well to the school-house. This evidence was refused as being

4. SAME: evidence of custom: instruction. immaterial. It was urged that such ruling was erroneous. It is argued that such evidence would tend to show the good faith of the defendant in requiring the water to be so carried on the particular day in question, and would warrant him also in believing that he had a right to require such service. The defendant is in no position to make such contention. His testimony was positive and unequivocal that he did not punish the pupil for refusing

to carry the water, but only for her impudent conduct in relation thereto. It is true that the trial court instructed the jury at this point that if the defendant, acting as a reasonable man, in good faith believed he had a right to require such service, and in such belief inflicted the corporal punishment because of the refusal of the pupil to perform the service, he would not be guilty of assault and battery. This instruction was more favorable to the defendant than his own evidence would warrant. If it were in a measure inconsistent with the theory adopted by the court in the earlier ruling rejecting the evidence of custom, it worked no prejudice to the defendant. The rejection of the evidence as immaterial was a proper ruling. It did not become otherwise by the later instruction of the court here referred to; the instruction itself being without prejudice. We are not without solicitude as to the correctness of the result in the trial court. If the jury attached undue weight to the testimony of the state, and failed to give proper consideration to the testimony of the defendant, not only has the defendant suffered wrong, but such wrong may result also in great demoralization in the discipline of the school. However, we are bound to be faithful to the actual record before us. The instructions of the trial court guarded the rights of the defendant with marked emphasis. He appears to have had a fair trial in the district court, and the result must be accepted as final.

The judgment of the district court is *Affirmed*.

BELLE A. CURTIS, Appellee, v. MARY S. ARMAGAST and CLIFFORD ARMAGAST, Appellants, and JAMES D. ANDREWS and AETNA LIFE INSURANCE COMPANY, Appellees.

Real property: ACTION TO CANCEL CONVEYANCE: LIMITATIONS. An action in the courts of this state to cancel a conveyance of land located here on the ground of fraud, which conveyance was executed in a foreign state where both the grantor and grantee resided,

is not barred by reason of the fact that some available remedy involving personal liability respecting the subject of the action was barred in the foreign jurisdiction, as such actions are of a distinct character; and as full relief could not be granted in a foreign jurisdiction the plaintiff was under no obligation to pursue the less effective remedy there, notwithstanding the provisions of Code Section 3452.

Same: LACHES. An action to cancel a conveyance for fraud in its execution is not barred by laches, where the defendant was in no manner misled to his injury by the delay, and no equities had intervened.

Fraudulent conveyances: EVIDENCE: RES GESTAE. In a suit by an heir to set aside a conveyance of his deceased ancestor, on the ground of the fraud of the grantee, proof of the declarations of the grantor at and immediately before the conveyance is competent as part of the res gestae, as bearing on the mental condition of the grantor; and all the facts and circumstances attending the transaction, including those bearing on the mental condition of grantor, and the influences exerted in bringing about the conveyance may be shown.

Same: BURDEN OF PROOF: CONSTRUCTIVE FRAUD: CONFIDENTIAL RELATION. One seeking to cancel a deed on the ground of actual fraud has the burden of proof on that issue; but in cases of constructive fraud, which is such fraud as the law infers from the relationship of the parties or the circumstances surrounding them, regardless of any dishonesty of purpose, the party claiming the benefit has the burden of rebutting the presumption which the law implies by proof that the contract was fairly procured, without undue influence or other impeaching circumstance; and this rule applies particularly where one of the parties by reason of the relationship has obtained a dominating influence over the other.

Same: PARENT AND CHILD: UNDUE INFLUENCE: EVIDENCE. The conferring of benefits by a parent upon a child is presumptively valid; the presumption of invalidity in such cases only arises where the child has become the dominant personage in that relationship and the parent the dependent one. Thus where a son had been intrusted by his mother for many years with the management of practically her entire estate, and she had given him her savings for investment, lived with him and trusted him in everything, a conveyance of her real estate to him without consideration, or any agreement on his part to maintain her, was presumptively invalid, and the burden was upon the son to show that the conveyance was without undue influence and was the free, voluntary and intelligent act of

the mother, as against her or those rightfully claiming through her.

Same: TRUSTS: CONFIDENTIAL RELATION: EVIDENCE. In this action 6 to set aside a voluntary conveyance from the mother to her son, the evidence is reviewed and held to show that the mother obtained the legal title to the land originally, free from any trust in favor of the son; that the conveyance from her to the son was not made in payment of any services rendered or for contributions to her support; and that the evidence is insufficient to overcome the presumption that the conveyance, owing to the confidential relation of the parties, was fraudulent and void.
Evans and Sherwin, JJ., dissenting.

Appeal from Mills District Court.—HON. A. B. THORNELL,
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION in equity to set aside and cancel certain conveyances and to quiet title to land. There was a decree in the district court in favor of plaintiff, and the defendants Armagast appeal.—*Affirmed.*

D. E. Whitfield and Smyth, Smith & Schall, for appellants.

John Y. Stone and Sullivan & Rait, for appellee.

WEAVER, J.—The facts leading up to the controversy involve a family history covering a period of more than half a century, with a multitude of details concerning some of which there is no material dispute and very many others about which there is a radical divergence in the testimony. It is manifestly impracticable to embody in this opinion all the facts having more or less bearing upon the merits of such a controversy, and the best we can hope to do is to select so much of the material contained in the record as will fairly illustrate the nature of the claims we have to consider.

James D. Andrews, now deceased, over whose dealings with his mother, Margaret Andrews, this litigation has arisen, was born in the year 1837. The family, consisting of the father, mother, son (James D.), and two daughters (Jessie and Margaret), settled in Iowa City in the year 1850. Another son, Peter, appears to have left home and gone to California early in life. He died intestate and without lineal heirs before the transactions now in dispute. The father was intemperate and thriftless, and except for a small amount of money belonging to the mother they were without substantial means. A family relative was engaged in mercantile business at the little town of Solon near Iowa City, and in 1855 took the son, then about eighteen years old, into his service as a clerk or assistant. Shortly thereafter, at the request of James D., his mother arranged to purchase the business. The amount paid appears to have been between \$1,000 and \$2,000. A large part of the purchase price was represented by money which the seller was owing Mrs. Andrews, and the remainder was obtained by her from friends in Scotland. The entire purchase price was less than \$2,000. It is the theory of the appellant that this purchase was made for James D., and that he became the owner of the business; but, according to the claim of the appellee, it was a joint adventure of the mother and son, she furnishing all the capital and giving her personal assistance in carrying on the enterprise. However this may be, it does appear that the family then removed to Solon, and there they conducted the store until 1857, when it was exchanged with one Pratt for about 1,340 acres of land in Mills county of this state. For some reason the title was taken temporarily in the name of James D. Andrews, but within a few days thereafter he conveyed 1,140 acres of the land to his mother. The other two hundred acres he conveyed to her at a later date; the deed reciting that it was intended to supply the place of one which had been made years before and lost without being recorded. After the store was disposed of, James D. attended school for a time, then entered

the employment of an express company, continuing therein until about the year 1871. Later he entered the customs service of the United States, in which he remained during the remainder of his life. His employment in these occupations removed him from Iowa, and he became a resident of New York. While still a young man at home, he insured his life for the benefit of his mother and kept the policy in force until his death. During his career he is shown to have been liberal with his mother and his sisters, who continued their home in Iowa, and from time to time contributed to their support and comfort. The sister Jessie never married. Margaret married, became widowed, and both lived in the same home with their mother. Margaret died in 1906 leaving the plaintiff herein her only surviving heir. James D. married in New York about the year 1871, after which his contributions to the support of the family in Iowa were for a time lessened or suspended; but it is due to him to say that he was at all times disposed to be helpful. About this time also the brother, Peter Andrews, to whom reference has been made, rendered some assistance to the family. In 1889 James D., being then a widower with two children, invited his mother and two sisters to make their home with him in New York. They did so and remained in his family until his death on May 19, 1900. Their place in the family was not that of entire financial dependence. Before leaving Iowa City they had enjoyed some income from the rental of rooms and had earned money to some extent in sewing and other employments. From such sources, from savings made from the contributions received from her sons, and doubtless to some extent from the tenants of the Mills county lands, the mother had accumulated a fund of \$4,000. In the New York home they performed most of the domestic service and assisted in various ways in bearing the burden of family cares. It is true, however, that the son and brother was regarded by them as their principal stay and support, and his success in life and his business capacity, as well as the kindness he had exhibited toward them all from

his boyhood, justified this confidence and reliance on their part.

Returning now for a time to a consideration of the land in controversy, the record indicates that until about 1874 it remained uncultivated and unproductive of any substantial income. It does not appear who, if any one, looked after the property, or who paid the taxes thereon during this period. About the year mentioned Mrs. Andrews began to lease the premises to tenants. A few years later James D., visiting his mother, learning that some difference had arisen between her and a tenant, went to Mills county, and, having made some sort of a settlement of the matter, he thenceforth, with her consent, kept the business in charge and himself, through agents of his selection, attended to the leasing and the collecting of rents. According to the testimony of the sister Jessie, he thereafter began and continued sending his mother \$50 per month. Whether this was intended as in the nature of a payment or accounting by him for the rents and profits of the land does not appear except as a matter of inference, which may or may not be justified from the circumstances we have mentioned. Some seven years after taking up her home with James D. in New York, Mrs. Andrews, then being about eighty-three years of age, made to him a warranty deed of the Iowa land for the expressed "consideration of one dollar and other valuable considerations." The circumstances under which this conveyance was made are involved in considerable obscurity. According to the story told by Jessie Andrews, her mother showed her the instrument before it was signed, saying it was something which James D. wished her to execute to give him the power to act for her about the land, but that she expressed a reluctance to do so, saying she wanted to keep it in her own power as long as she lived, expressing at the same time her willingness that James should do business for her and her confidence that he would do what was right. The witness says that she herself saw that the paper was a deed of some kind, but did not understand that

the effect of it would be to convey the property away. Some three days later Mrs. Andrews, accompanied by James and Jessie, went to the office of a notary, where the deed was executed and acknowledged. Testimony was admitted on the trial of statements by and conversations with Mrs. Andrews after this date to the effect that she had been led to sign the conveyance supposing it to be a power of attorney, and that she did not understand the true nature of the business until after the death of James. This statement is also rebutted by proof of other alleged statements by her of a very different import, indicating her full understanding of the conveyance she had made and expressing the utmost confidence in her son.

In the year 1898 James D. Andrews became a helpless paralytic, in which condition he lived about two years. While physically prostrate and speechless, it is shown that he retained his mental faculties, and by the use of various devices those who ministered to his wants learned to communicate with him. A few months before he died he executed a conveyance of the land to his son and daughter, his only children. This deed was not delivered, and on March 26, 1900, before his death in May of that year, he made and delivered to his daughter, Mary S. Armagast, as sole grantee, a warranty deed of the land for the expressed consideration of one dollar. His mother survived him until the year 1903, when she died intestate at the age of ninety years. The only heirs of said deceased are her daughter, Jessie L. Andrews, her granddaughter, Belle A. Curtis, only child of Margaret Andrews Gray, deceased, and her grandchildren James D. Andrews, Jr., and Mary S. Armagast, only children of James D. Andrews, deceased. On April 5, 1909, Belle A. Curtis, as heir to one-third of the estate left by her said grandmother, began this action alleging that the conveyance from Margaret Andrews to her son was obtained by fraud, and the title so procured was held by the grantee in trust for the grantor, and asking that a decree be entered accordingly, that said con-

veyance be concealed, and plaintiff adjudged the owner of a one-third part of the land, and that an accounting be ordered of rents and profits received by the defendants. To this action Mary S. Armagast appears and defends. She denies all allegations of fraud in the procurement of the deed. She alleges that Margaret Andrews not only understood the nature and effect of the conveyance, but that with her full knowledge and consent James D. Andrews, relying upon said deed, took full charge and control of the property claiming both in public and private the full beneficial ownership thereof and taking and using as his own all the rents and income derived therefrom. She further alleges that Margaret Gray, through whom plaintiff claims, knew of the conveyance to James D. Andrews and acquiesced therein without protest, and also knew and acquiesced in the conveyance by James D. Andrews to his daughter, who, as she knew, relying upon said conveyance, assumed full control of said premises as their rightful owner. Defendant further pleads that plaintiff's right of action, if any she ever had, has been barred by the statute of limitations of the state of New York and the statutes of Iowa. For a further answer she alleges that plaintiff has been guilty of laches in bringing her action, and is therefore estopped to demand or receive equitable relief. The issues were tried and submitted to the court, which entered a decree for plaintiff substantially as prayed.

I. We have first to inquire whether the plea of the statute of limitations is available to the defendant. The deed sought to be avoided or held to create a trust in favor of

1. REAL PROP-
ERTY: action
to cancel con-
veyance: limi-
tations.

Margaret Andrews and her heirs was made in New York. The grantee was then a resident of that state and continued to reside there until his death in 1900. The grantor also resided there from a date prior to the deed until her death in 1903. The appellants have at all times been residents there. The plaintiff has never been a resident of New York, but her mother, through whom she traces her claim

of title, did reside there from 1889 until her death in 1906. The property in controversy is real estate wholly within the jurisdiction of the state of Iowa. It is alleged in answer that under the statutes of New York "an action brought to procure a judgment other than for a sum of money on the ground of fraud, in a case formerly cognizable by the court of chancery," must be brought within six years after the cause of action accrued, but such cause shall not be deemed to have accrued until discovery by the plaintiff or by the person under whom he claims of the facts constituting the fraud. Proof of the New York statute does not appear to have been made upon the trial, but for the purposes of this appeal we may assume it to be as stated. The point urged by appellant is that, while it would not be competent for the courts of New York to entertain an action *in rem* for the recovery of the land in Iowa, it could take cognizance of an equitable action against one of its own citizens and compel him to do equity, although the subject-matter of the controversy be lands within the jurisdiction of another state. Relying on this principle, counsel argue that as plaintiff or those through whom she claims might have brought an action in New York against James D. Andrews in his lifetime or against Mary S. Armagast after she took the title, and upon proof of the alleged fraud could have had a decree compelling a reconveyance or restitution of the title, but failed to do so for more than six years, the bar of that statute may be pleaded to an action thereafter begun in this state.

Turning to our own statute we find a provision somewhat similar to the one alleged to prevail in New York but making the period five years. It is also provided that actions for the recovery of real property may be brought within ten years. Code, Section 3447. But the time during which a defendant is a nonresident of this state shall not be included in computing any of these limitations. Code, Section 3451. It is evident therefore that the statute of New York furnishes no defense to an action brought in this state, unless

the case comes within the scope of that other provision which reads as follows: "When a cause of action has been fully barred by the laws of any country where defendant has previously resided such bar is effective in this state except as to causes of action arising here." Code, Section 3452. That this statute is not applicable to the case before us will become clear upon a little reflection. It is conceded that the courts of New York are without jurisdiction to grant any relief in the premises except such as involves the personal liability or personal conduct of one found in that jurisdiction. For instance, they would entertain an action for the recovery of a personal judgment for damages although the controversy more or less involves the title to lands in another state. Having the parties within their jurisdiction, they could also to a certain extent compel them to do equity by executing proper conveyances or releases affecting titles to such lands and enforce their decrees so far as practicable by injunction or other appropriate writ; but such remedy is neither full nor complete. No court can properly assume to deal directly with land situate in a foreign jurisdiction. It cannot quiet title thereto, or establish or extinguish liens thereon, or restore possession, or cancel records, or afford many other forms of relief which affect primarily the *rem.* The prayer for relief in this case is that the deeds from Margaret Andrews to James D. Andrews and from James D. Andrews to Mary S. Armagast be canceled and expunged from the records of Mills county, that plaintiff be adjudged the owner of an undivided one-third of the property free from the lien of a mortgage placed upon the land by Mary S. Armagast, and for an accounting of rents and profits. She also asks a writ of possession in her favor and for general equitable relief.

That the New York courts would not and could not enforce a remedy of this nature would seem to need neither argument nor citation of authorities, but see *Gillett v. Hill*, 32 Iowa, 220; *Blackman v. Wright*, 96 Iowa, 541; *Carpenter*

v. Strange, 141 U. S. 87 (11 Sup. Ct. 960, 35 L. Ed. 640); *Davis v. Headley*, 22 N. J. Eq. 115; *Short v. Galway*, 83 Ky. 501 (4 Am. St. Rep. 168); *Clarke v. Clarke*, 178 U. S. 186 (20 Sup. Ct. 873, 44 L. Ed. 1028); *Clarke's Appeal*, 70 Conn. 195 (39 Atl. 155); *Insurance Co. v. Bank*, 68 Ill. 348; *Fryer v. Myers* (Tex.) 13 S. W. 1025; *Wilson v. Braden*, 48 W. Va. 196 (36 S. E. 367); *Pritchard v. Henderson*, 2 Pennell (Del.) 553 (47 Atl. 376); *Courtney v. Henry*, 114 Ill. App. 635. That plaintiff could have gone into the courts of New York, and, having personal service upon the defendant, there procured a decree or judgment requiring a reconveyance of the land—a remedy operating solely *in personam*—is no answer to the suggestion. Having a right of action in this state, the only jurisdiction in which full and final relief could be procured, she was not bound to pursue the less effective remedy. And permitting such remedy to become barred by the statute of a foreign state could not bar her right to resort to another and more efficient remedy in this jurisdiction and against which our own statute has interposed no bar. The precedents cited by counsel for the most part go no farther than to recognize the authority of a foreign court having jurisdiction of the persons to enter judgment operating *in personam*; but none appear to hold that failure to seek such relief affects in any manner the right of the injured party to seek that relief which can be fully administered only by the tribunals of the state where the property is situated.

There is yet another reason why Code, Section 3452, is inapplicable. The terms of that section expressly exclude from its operation causes arising in this state. Now, while the alleged wrong for which the prayer for relief is predicated was committed in New York, the cause of action for the relief here demanded did not arise there. A cause of action cannot be said to “arise” in any jurisdiction whose courts cannot take cognizance of the complaint and administer appropriate relief. No matter where the alleged wrong-

ful act was done, if its harmful effects operate solely upon property and rights and titles subject to the exclusive jurisdiction and control of the courts of Iowa, then here, and not elsewhere, is the place where such cause of action arises. The defense of the statute of limitations cannot therefore be sustained.

Nor do we find any merit in the plea of laches. The appellants, so far as appears, have in no manner been misled to their injury by the delay in bringing suit, and no equities have intervened which require the court to hold the plaintiff estopped from pursuing the remedy she has chosen. *Hemphill v. Holford*, 88 Mich. 293 (50 N. W. 300).

II. Counsel argue with much force against the admissibility of statements alleged to have been made by Margaret Andrews and immediately before the execution of the conveyance by her to her son. We are of the opinion, however, that in the case presented by the record before us the testimony, or at least some of it, is competent. Ordinarily, of course, a deed or other writing cannot be impeached by proof of declarations of the grantor, but it is here the theory of the plaintiff's case that the instrument was obtained by fraud, actual or constructive; that by reason of the grantor's advanced age, her weakened powers, her want of business knowledge and experience, and her peculiar trust and confidence in her son, she was deceived as to the real nature of the transaction and did not comprehend or understand that she was parting with the beneficial ownership of the land. Upon an issue of that nature we incline to the view that evidence of her language and conduct with respect to that transaction at the time and immediately before it was consummated is competent both as *res gestae* and as bearing upon her mental condition. This has often been held where the validity of a will or of an alleged gift is under consideration. *Vannest v. Murphy*, 135 Iowa, 123; *Johnson v. John-*

2. SAME: laches.

3. FRAUDULENT
CONVEYANCES:
evidence: *res*
gestae.

son, 134 Iowa, 33; *Kah's Estate*, 136 Iowa, 119; *Manatt v. Scott*, 106 Iowa, 203; *Bever v. Spangler*, 93 Iowa, 576; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Sanderlin v. Sanderlin*, 24 Ga. 583; *Garnsey v. Mundy*, 24 N. J. Eq. 243.

The record in this case tends to support the conclusion that the deed to James D. Andrews was made without any present valuable consideration and, if valid, was in the nature of a gift or ante mortem disposition of the principal part of the grantor's estate, and we see no reason why the court may not inquire into all the circumstances attending the transaction, including all matters of fact having any legitimate tendency to show the capacity of the giver and the influences, if any, leading her to make the gift. Upon the trial both parties availed themselves of the benefit of this rule to a very liberal extent, with the result that more or less of incompetent hearsay may be found in the record; but, when all this has been eliminated, considerable remains which may properly be considered.

III. Decision of the merits of this controversy involves the consideration of two questions: First, was the deed to James D. Andrews obtained by actual fraud? And, second,

4. **SAME:** burden of proof: constructive fraud: confidential relation. if not obtained by express or actual fraud, was it obtained by constructive fraud? Or, stated otherwise, was it obtained under circumstances which cast upon the grantee and those claiming under him the burden of an affirmative showing of entire good faith on his part and free, voluntary, and intelligent action on the part of the grantor?

Were the appeal to be disposed of upon answer to the first inquiry, we should have no serious hesitation in reversing the decision of the trial court. The burden of showing actual fraud is upon the party pleading it, and in our judgment plaintiff fails to make such a case. It is unnecessary for us to recite the evidence upon this issue. It is enough to say that no witness speaking of his or her own knowledge testifies to any misrepresentation, falsehood, or deceit on the part of

the son to persuade or mislead his mother into a conveyance of her land, and the court should not and cannot enter into the realm of conjecture to fasten that stigma upon him.

The other question is more difficult of solution. What is called "constructive fraud" does not necessarily negative integrity of purpose. *Lampman v. Lampman*, 118 Iowa, 140. It has been defined as "an act which the law declares fraudulent without inquiry into its motive." *McBroom v. Rives*, 1 Stew. (Ala.) 72. Or "such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead, or to violate confidence, are prohibited by law." Bouvier, Law Dictionary. It has also been said to be such fraud as "the law infers from the relationship of the parties or the circumstances by which they are surrounded, regardless of any actual dishonesty of purpose." 14 Am. & Eng. Ency. of Law (2d Ed.) 21.

The use of the phrase "constructive fraud" has frequently been severely criticised by the courts and lawwriters as being misleading and unscientific, but it has become so fixed in the literature and terminology of the law that any attempt to substitute a more fitting name for the thing to which it is applied would result in confusion. The necessity of considering this phase of the law arises most frequently in controversies which grow out of dealings between persons when one occupies fiduciary or confidential relations to the other. As between such persons, a contract by which the one having the advantage of position profits at the expense of the other will be held presumptively fraudulent and voidable, and the burden is placed upon him who claims the benefits thereof to rebut that presumption by an affirmative showing that such contract was fairly procured without undue influence or other circumstance tending to impeach its fairness. Though strictly of differing signification, the phrases "fiduciary relations" and "confidential relations" are ordinarily used as convertible terms and have reference to any

relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, or do have and exercise, influence over each other. The rule or presumption to which we have referred is more particularly applicable where one of the parties to such relation has by reason of his stronger character, greater ability, and wider experience, or by his hold upon the affection, trust, and confidence of the other, obtained a dominating influence over him. The relationship of principal and agent, attorney and client, parent and child, guardian and ward, is frequently mentioned as illustrative examples, but fiduciary or confidential relations may exist under a great variety of circumstances. Mr. Pomeroy states the general proposition as follows: "The doctrine arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption." 2 Pomeroy, Eq. (3d Ed.) section 956. In *Rodes v. Bate*, L. R. 1 Ch. 252, Turner, L. J., says: "I take it to be a well-established principle of this court that persons standing in confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. . . . The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying that it ought to be applied whatever the nature of the confidence reposed or the relationship of the parties between whom it has subsisted. I take the

principle to be one of universal application." After quoting this precedent, Mr. Pomeroy speaks of all those instances in which the two parties in confidential relation "consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it may be valid; but a presumption of its invalidity arises which can only be overcome, if at all, by clear evidence of good faith, or full knowledge, and of independent consent and action." 3, Pom. Eq. (3d Ed.) section 957.

While the relation of parent and child is nearly always given as an illustration of confidential relations, it does not follow that all transactions between persons occupying that relation are presumptively invalid. Indeed, it may be said that as a general rule the conferring of benefits by a parent upon a child is presumptively valid. The unfavorable presumption arises only where the child, by reason of its youth and inexperience or other special circumstances, is to some degree under the dominion, control or paramount influence of the parent, or where the child is the dominant personage in that relationship and the parent has become the dependent one, trusting herself and her interests to his advice and guidance. *Mulock v. Mulock*, 31 N. J. Eq. 594; *Parker v. Parker* (N. J.) 5 Atl. 586; *White v. Daly* (N. J. Ch.) 58 Atl. 929; *Fitch v. Reiser*, 79 Iowa, 34; *Nobles v. Hutton*, 7 Cal. App. 14 (93 Pac. 289); *Gibson v. Hammang*, 63 Neb. 349 (88 N. W. 500); *Doyle v. Welch*, 100 Wis. 24 (75 N. W. 400); *Cole v. Getzinger*, 96 Wis. 559 (71 N. W. 75); *Mott v. Mott*, 49 N. J. Eq. 192 (22 Atl. 997).

This is in no manner inconsistent with the undoubted right of parents to dispose of their estate as they may think best. They may by deed or will dispose of it to persons outside of the family, or may give it all to one or more of their

5. SAME: parent
and child: un-
due influence:
evidence.

children and ignore the equal and perhaps superior rights of others. No presumption of fraud or undue influence arises from the mere fact that a mother exercises such right, or that she has preferred one child and left another unprovided for; but when, in addition to such a conveyance, under such circumstances it appears that she was at the time wholly dependent upon the grantee for advice, residing in his home and placing in his hands the management and control of all her business interests, and in all things manifesting her implicit confidence and trust in him, the taking of a conveyance of substantially all her estate without consideration and without any writing binding him to support her through life, there is a presumption of undue influence which equity will require the beneficiary of the transaction to rebut before his claim of title thus secured can be sustained against an attack by the grantor or by those who succeed to her rights. The rule is well stated in *Mott v. Mott*, 49 N. J. Eq. 192 (22 Atl. 997), as follows:

With reference to transactions between parent and child, the law presumes that the influence of the parent over the child during the tender years of infancy is so controlling that it regards transfers from child to the parent on arriving at majority or immediately thereafter as having been made under the influence of overweening confidence. As the child matures and acquires experience and independence, the presumption weakens and at last ceases. As the parent, however, advances in years, the condition of dependence may be reversed by the hand of time. If life draws to a close with a failing intelligence and enfeebled frame, the parent naturally looks to a son or daughter for advice and protection. The parent becomes the child with the same dependence, overweening confidence, and implicit acquiescence which had made the other in infancy the willing instrument of the other's desires. *Highberger v. Stiffler*, 21 Md. 338 (83 Am. Dec. 593); *Martin v. Martin*, 1 Heisk. 653; *Comstock v. Comstock*, 57 Barb. (N. Y.) 453; *Whelan v. Whelan*, 3 Cow. (N. Y.) 557. If, under such circumstances, a son obtains a conveyance from a parent, the court will not permit it to stand unless he establishes by

abundant proof that the contract was free and fair and made with the utmost good faith.

In *Fitch v. Reiser*, 79 Iowa, 34, this court had to consider a conveyance by an old man to his daughter, upon whom he largely depended for advice and in whom he placed great reliance. After considering the evidence, we said:

We are not prepared to say that the evidence shows an absolute want of mental capacity to make a testamentary disposition of property. But in consideration of the extreme mental weakness of the deceased at the time the deed was executed, and as the property in controversy embraced substantially all of his estate, and as the deed was without consideration, and in view of the relation of trust and confidence between the parties to the conveyance, we think the learned district judge was right in entering a decree annulling the deed. The control of the defendant over the deceased appears to have been absolute. Under such circumstances, it was incumbent upon the defendant to show that the conveyance was made voluntarily and without the exercise of any influence on her part to procure the same.

In *Reese v. Shutte*, 133 Iowa, 682, the court, speaking by Sherwin, J., said: "It is well settled that transactions of this kind between an aged and infirm parent who has reposed confidence and trust in the child will be closely scanned by the court, and that the burden is on the grantee to show the *bona fides* thereof." The same rule is approved in *Spargur v. Hall*, 62 Iowa, 500. In *Davis v. Dean*, 66 Wis. 109 (26 N. W. 740), where a deed from mother to son was in question, the court, after discussing the evidence of mental competency, uses this language: "The transaction, if upheld, practically disinherits her daughter and her other heirs. Assuming her mental competency, this strange and unnatural disposition of her property of itself strongly suggests the existence of improper influence upon her mind." Of the burden of proof the court further says: "The grantee has failed to satisfy the requirements of the rule, and the presumption of injustice,

fraud, and wrong stand against the conveyances, which he must remove before the court is authorized to say that they are valid." The same rule is applied in *Barnard v. Gantz*, 140 N. Y. 249 (35 N. E. 430). Dealing with a conveyance from an aged mother to a son to whose hands she had intrusted all her business and upon whom she largely relied in all her affairs, the Illinois court has said:

A gift made by a parent to a child on account of the affection of the former for the latter, even where it is made at the solicitation of the child, is not the object of suspicion, and there is no presumption against its validity unless the relation between them is something more than the ordinary relation between parent and child. Where, however, the natural positions of the parties become reversed—where the parent defers to, trusts in, and yields to the child, when there exists between them what in law is termed a fiduciary relation in which the parent is dominated by the child, and where the child prepares or causes to be prepared and executed an instrument conveying to him property of the parent as a gift or upon a grossly inadequate consideration—the presumption arises that the transfer was obtained through undue influence, and the burden rests upon him to show that the conveyance was the result of full and free deliberation on the part of the parent. This is not peculiar to transactions where the parties are parent and child, but is the law in any case where a fiduciary relationship exists, where the conveyance is from the dependent to the dominant party, and where the donee or grantee prepares or procures the preparation and execution of the deed or other instrument; and the rule is applied under such circumstances wherever that relation exists, no matter whether the parties are related by blood or not. (*Rickman v. Meier*, 213 Ill. 507, 72 N. E. 1121.)

The rule of the cited cases has been very frequently affirmed and prevails in practically all the states. For example, in addition to the cases hereinbefore cited, see *Coffey v. Sullivan*, 63 N. J. Eq. 296 (49 Atl. 520); *Hensan v. Cooksey*, 237 Ill. 620 (86 N. E. 1107, 127 Am. St. Rep. 345); *Soberanes v. Soberanes*, 97 Cal. 145 (31 Pac. 910); *Brummond*

v. Krause, 8 N. D. 573 (80 N. W. 686); *Kerr on Fraud & Mistake*, 150-152; *Thorn v. Thorn*, 51 Mich. 167 (16 N. W. 324); *Parker v. Parker* (N. J.) 5 Atl. 586; *Bowe v. Bowe*, 42 Mich. 195 (3 N. W. 843); *Slack v. Rees*, 66 N. J. Eq. 447 (59 Atl. 466, 69 L. R. A. 393); *Hall v. Otterson*, 52 N. J. Eq. 528 (28 Atl. 907); *White v. Daly* (N. J. Ch.) 58 Atl. 929; *Post v. Hagan*, 71 N. J. Eq. 234 (65 Atl. 1026, 124 Am. St. Rep. 997); *Hattie v. Potter*, 54 Wash. 170 (102 Pac. 1023); *Swanstrom v. Day*, 46 Misc. Rep. 311 (93 N. Y. Supp. 192); *Couch v. Couch*, 148 Ala. 332 (42 South. 624); *Highberger v. Stiffler*, 21 Md. 338 (83 Am. Dec. 593).

Under the rule upheld by these precedents, we think there is no room for doubt that the burden in the case before us is upon the defendants to affirmatively show that the deed under which they claim was obtained without undue influence and was the free, voluntary, intelligent, and unrestrained act of the grantor. James D. Andrews, the grantee, was not merely the son of the grantor. He was her agent, and for nearly twenty years had been intrusted by her with the management of these lands comprising practically all her worldly estate. She had also placed in his hands a part of her small savings for investment. She was a member of his family living under the same roof with him. She unquestionably regarded him with great affection and put implicit trust and confidence in his ability and his purpose to do whatever was right with respect to her property and property interests. The deed which she made to him was absolute in form and vested him with title to all the land—her entire estate—without reservation or power of recall. So far as appears, there was no agreement or promise on his part to provide her maintenance or home for the remainder of her life. Doubtless he expected to do so; but, legally speaking, there was no reason why he might not on the next day decline to render her further support. What is still more to the point, no thought appears to have been taken of the possibility that his mother might outlive him, as in fact she did, and that in such case the

land which had been her safe security against want would pass wholly to his heirs without the slightest obligation on their part to keep or care for her except by way of charity. And all this was given without valuable consideration to the son occupying the closest confidential and fiduciary relation to her and to the exclusion of her two surviving daughters.

Among all the very many cases in which a child has been held to the burden of negating presumptive fraud or inference of undue influence in the procurement of an advantageous contract from a parent, it will be difficult to select any in which the showing is stronger than the one here presented. As we have already shown, it is not necessary to the application of this rule that the court should find or presume an actual intent upon the part of the son to wrong his mother. Indeed, if there were any such actual intent, the fraud would be express and not constructive. He had so long had a free hand in managing the land that he doubtless felt something akin to a sense of proprietorship. The evidence tends to show that in conversation with strangers and third persons he was in the habit of speaking of the property as his own. His mother and sisters were evidently women of simple tastes and habits, living in his family, and we may presume that he expected to continue to provide for them. Under such circumstances, it would perhaps be natural and evince no moral turpitude on his part if he secured from her the title to the land so long as he was willing to give to her and his sisters the one substantial benefit they could derive from its ownership—a home and the supply of their reasonable personal wants. But the end which the principle which we have been discussing is intended to promote may not be defeated by a showing of good intentions. The rule has not been formulated to punish active or premeditated wrong, but to close the door against resulting wrong. In the very nature of the situation, where the parties occupy such intimate relations, it is rarely, if ever, possible to prove the extent to which the weaker or dependent party's action has been influenced

by that relationship; hence the burden is properly placed upon him who has profited thereby to make an affirmative showing, not merely of good faith on his part, but of absolute freedom of intelligent action on the part of the grantor. The New Jersey court goes to the extent of holding that every conveyance from an aged and dependent parent to a child occupying a relation of trust and confidence will be invalidated unless in making it the parent has had the benefit of competent independent advice on the subject. *Slack v. Rees*, 66 N. J. Eq. 447 (59 Atl. 466, 69 L. R. A. 393); *Post v. Hagan*, 71 N. J. Eq. 234 (65 Atl. 1026, 124 Am. St. Rep. 997); *Baur v. Cron*, 71 N. J. Eq. 743 (66 Atl. 585); *Hall v. Otterson*, 52 N. J. Eq. 528 (28 Atl. 907). See, to the same effect, *Rodes v. Bate*, L. R. 1. Ch. 252, and 3 Pom. Eq. (3d Ed.) section 957. In *Post v. Hagan*, *supra*, the court defines "proper independent advice" to mean that the donor had the benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidentially as to the consequences to himself of his proposed benefaction." It is probably not necessary for us in this case to go to the full extent of the precedents here cited, but it may be said they discuss and defend the principle so announced with logical force and clearness.

With evident appreciation of the rule we have here affirmed as to the burden of proof in support of a conveyance in the nature of a gift to one who holds a confidential or

6. SAME: trusts: confidential relation: evidence. fiduciary relation to the grantor, counsel for appellants argue that in the case at bar James

D. Andrews was at all times the beneficial owner of the land, that the mother held the legal title as a trustee for his benefit, and that in conveying it to him she was only vesting him with that which was already equitably his own. But this claim is without basis in the record. In-

deed, even if the burden upon this question were upon the appellee—and of course it is not—we should have to say that the evidence shows beyond all reasonable question that at the date of the deed to her son Margaret Andrews was both in law and in equity the absolute owner of this property. So far as appears, James D. Andrews never invested a dollar in its purchase. The stock of goods exchanged for it was paid for with the mother's money, and, while for some reason not shown the title to the land was at first conveyed to the son, he almost immediately conveyed it to his mother, in whom it rested for nearly forty years. It also affirmatively appears that some fifteen years or more after the title had been vested in Margaret Andrews a judgment creditor of James D. Andrews, claiming that the latter was in fact the owner of the land, or of some of it, undertook to subject it to the payment of his claim. Thereupon the mother brought an action in equity to enjoin the sale. Upon trial of the cause both mother and son testified by deposition in support of her title, and she was found to be the true owner and the sale permanently enjoined. So far as the record shows, James D. Andrews never exercised or claimed any right in or authority over the land until about the year 1878, when, as we have before mentioned, in visiting the family in Iowa he went to Mills county and settled some dispute which had arisen between his mother and her tenant or agent, after which, apparently at her request, he continued in the management of the property. Except statements alleged to have been made by him to persons outside of the family, there is no evidence that he ever denied the absolute character of his mother's title or claimed ownership in himself. In short, all the competent testimony having any bearing on that question tends to support the presumption of ownership attaching to the legal title which for more than a generation confessedly stood in Mrs. Andrews.

Again, it is strenuously argued that this conveyance was but the natural and proper recognition by Mrs. Andrews of

the indebtedness of herself and family to James for his services and contributions in the matter of their support. It is no disparagement of the filial loyalty and kindness of James D. Andrews, which all admit, to say that this argument is somewhat overwrought. He was undoubtedly a helpful son. He was active, industrious, and within the range of his earning capacity, was from boyhood liberal in assisting the family. But they were not wholly dependent upon him or upon his ability to make such contributions from his salary, which was necessarily restricted. The only witness in position to speak from personal knowledge estimates the help furnished by him up to the time of his marriage in 1871 at from \$150 to \$200 per year. After his marriage his own increased cost of living appears to have interrupted his contributions to his mother until about 1878, when he took over the management of the land, from which date to 1889, when she went to live with him, his remittances were about \$50 per month. Thereafter his assistance to her and his sisters was limited to the supply of their needs as members of his family, for which service on his part there was at least partial return of value in their services to him and his family. Computing his contributions at the highest estimate from 1857, when he was a boy of twenty years until 1889, when the family was reunited in his New York home, their aggregate will not exceed \$10,000. On the other hand, the rental value of the land from 1878 to 1896 is shown to have been \$2,000 to \$2,500 per year, or an aggregate for eighteen years of \$36,000 to \$47,000, and, if we add thereto the estimate for the four years between the date of the deed and the death of James D. Andrews, the aggregate will be increased to \$44,000 to \$49,000. How much of this was actually realized above expense and taxes we do not know, for no account has been exhibited; but it is shown that the entire tract is fair average Iowa land, all under cultivation, and that for a period of seven years Mrs. Armagast has secured therefrom an aggregate net income of \$22,555.82. It is therefore reasonably clear that, conceding to James D.

Andrews full and deserved credit for the care manifested and the expense incurred by him on account of his mother and sisters, he had received in return financial benefits far in excess of the benefits conferred by him.

We have left therefore only to consider whether the evidence offered in support of the defense sufficiently sustains the burden of proof as to the validity of the deed. This in our judgment must be answered in the negative. We may further add that such must be our conclusion even if we eliminate from the record all the testimony offered by the plaintiff concerning the alleged declarations of Mrs. Andrews. It does sufficiently appear that the deed was prepared and executed at the request or by the procurement of James D. Andrews, that it was wholly without valuable consideration, that it conveyed to him with no power of revocation on her part the mother's entire estate without any provision or binding legal obligation of the son for her support or for the support of her daughters, and that at the date of such transfer the son receiving such valuable gift was her agent and the sole manager of her property interests. It further appears, as we have already shown, that at this time she was eighty-three years of age, with at most no more than an average mental strength, which is normal in persons of her years, that she was an inmate of the son's family and depended upon him with entire faith and confidence in his judgment and fidelity. The defendants made no affirmative showing whatever of the conversations or negotiations between mother and son or of the promises or undertakings, if any, on his part. They do offer evidence of witnesses to the execution of the deed that the grantor appeared to be of sound mind and to have an intelligent conception of what she was doing, but this falls far short of negating the presumption or inference of undue influence. In a large majority of the cases hereinbefore cited the mental capacity of the grantor to make a valid conveyance is conceded, but it is universally held that this showing does not of itself fill the requirements of the

rule. It is at this point that there is a marked failure of proof which requires an affirmance of the decree of the district court.

The importance of the interests involved in the controversy and of the rules of law upon which the decision depends is our only apology for the unusual length to which we have pursued its discussion.

The appeal cannot be sustained, and the decree below is *Affirmed*.

EVANS, J. (dissenting).—I am unable to concur in the majority opinion. After a careful study of the record herein, I cannot avoid the conclusion that the merits of the case are with the defendant. The majority opinion is made to rest upon the theory of constructive fraud, in that fiduciary relations existed between the parties to the deed at the time of its execution, and that the burden is upon the defendant to support the deed with extrinsic evidence and to rebut thereby a legal presumption of fraud. As to the general proposition of law thus set forth in the majority opinion, I make no controversy. As applied to this record, however, such proposition is perhaps overemphasized in the majority opinion, and I am inclined to make that criticism upon it. The deed under consideration is an old one. Both parties to it were dead many years before this action was brought. Direct evidence from the parties themselves is therefore impossible. The extrinsic evidence upon which the defendant must necessarily rely is largely circumstantial and is to be found in the history of the family, extending over a period of forty years. This history is succinctly stated, in the main, in the majority opinion. I will avoid repetition as much as possible, but I cannot wholly avoid it without rendering my own statement unduly disconnected.

In 1857 the Andrews family consisted of the parents and the son, James D., and the daughters, Jessie and Margaret. The father was a drunkard and of no assistance to

his family. He died in the early sixties. The son James D. was born in 1837. Margaret was older and Jessie was younger. Margaret was married in 1850 to one Gray, but was later separated from her husband. She had one child born in 1856, named Belle, and she is the plaintiff herein. She also was a member of the Andrews family. Her mother is known in this record as Margaret Gray, her aunt as Jessie Andrews, and her grandmother as Margaret Andrews. Prior to 1857, Margaret Andrews and her son James D. had engaged in an enterprise of storekeeping at Solon, which lasted for a couple of years or more. The store was traded for the land in controversy, and other land. The land was cheap and unproductive; the family was poor. In 1857, James D. left home and obtained employment. The financial relations between him and his mother and his sisters began at this point. The only living witness who has personal knowledge of these matters is the sister Jessie. She was a witness on behalf of the plaintiff. She is interested adversely to the defendant in precisely the same manner that the plaintiff is. The greater part of her testimony is incompetent under the provisions of section 4604, but I shall spend no time upon that question in this dissent. Notwithstanding her adverse interest, her testimony discloses a state of facts which tends strongly to support the transaction now under attack.

Beginning in 1857, James D. sent of his wages to his mother and sister from \$150 to \$200 every year until he was married in 1871. It is said by Jessie that his contributions ceased during his married life. But his married life was very brief; his wife dying in 1874, leaving him with two children, a son and a daughter. At this time, James D. was in the government service in New York City. He continued his benefactions and visited his mother and sisters often. In 1879 the farm began to pay a revenue, and he looked after it through a resident agent. It is assumed in the majority opinion that James D. got the benefit of the

use of this farm for himself. This assumption is based wholly upon an estimate of the witness Jessie that he sent his mother about \$50 a month. The record shows quite satisfactorily that the mother and sisters had complete knowledge concerning all revenues from the farm, and that whatever was done was recognized by all of them as just and proper. This appears from some letters in the record written by Jessie herself in the eighties. In the early sixties, James took out a life insurance policy for \$10,000 in favor of his mother and kept it in force throughout his life.

In 1889 he invited his mother and sisters to come to New York and make their home with him. Such arrangement was entered into. The family at Iowa City at that time consisted of the mother and two daughters and Mabel Stuart, a daughter of the plaintiff herein by her first marriage. James D. rented a residence near Sheepshead Bay, which was occupied by the family until it was broken up by death. It is urged in appellee's argument and somewhat assumed in the majority opinion that this invitation was extended by James D. for his own advantage and in order to obtain the help of his mother and sisters in taking care of his own children. The record warrants no such assumption. His children were already quite grown up and were away at school. The oldest, the daughter (now Armagast, the defendant herein), had attained her majority. The son became engaged in business and never made his home there after such date. Prior to 1889 James D. had already become a mere boarder. It is too plain for argument that the home thus provided operated greatly to the advantage of the mother and sisters and the niece Mabel. The services rendered by the mother and daughters which is much paraded in argument was a service principally to themselves. Jessie testified on this subject as follows:

The circumstances under which the family moved to Brooklyn were these: My brother had his two children in

school. He was boarding. He asked me to come on and stay with his daughter Mary. She wished to attend some concerts down at Brighton Beach. I spent the summer of 1888 with him. The next summer she came out and stayed with us. Her father came after her. He asked Mother if she would not come to New York and keep house for him. He was tired living in a boarding house. He was going to build a house. The family moved to Brooklyn on his solicitation. He was boarding, and he wanted a home for his children. He thought it would be nice for us all to be together. He only hesitated on account of Mother's age, for fear she might not like the change; but she was willing to go. We were to live with him as one family. He expected to build a house for us. One inducement was that my sister was very fond of flowers, and he was planning a greenhouse for her. We removed to Brooklyn in November, 1889. He advanced the money to go there. Mabel Stuart went with us. She was Mrs. Gray's granddaughter, and the daughter of Mrs. Curtis, the plaintiff. She was a member of our family at the time we removed to Brooklyn. Her mother was living in Omaha part of the time and part of the time in St. Paul. Mrs. Curtis was unfortunate in her first marriage and left her husband. She had to go to work. She was a stenographer and held a very good position, but left Mabel with us. I wrote to my brother before going to New York and asked him how it would be about Mabel coming. Mrs. Gray thought perhaps there would be objection to it. He wrote back that she was perfectly welcome to come with the rest of us. I do not think Mother would have gone to New York without Mabel. Mabel was then eight years old and had lived in the family four years. My sister and I did most of the work of the family. My brother's two children were in school. Mabel was in school and Mother was not able to do very much work. We never had any servant except a woman in to wash two or three times during that time. His daughter did some sewing for herself after she was out of school. Aside from my board, I do not think I ever got more than \$50 in money; that is, \$50 a year. It did not cover the expense of my clothes. Some of those were given to me. The cost to my brother for our clothes I could hardly say. We did not have such a lot of clothes. We made them ourselves. I think, to take it on an average, it would not be more than \$100 a year for me. Mrs. Gray got a little more than I did.

I do not know whether she got more than \$100 a year or not. Mother required very little. He looked after us all as my father would look after his children. He always seemed like a father to me. He always seemed to regard us with love.

James D. was not a man of wealth. At the time of his death he had been in the government service for a great many years, beginning with a salary of \$1,500, which had been increased to \$2,400 in the last ten years of his life. This was the highest salary he had ever received. It is the testimony of Jessie that he bore every expense of every kind for the family. It goes without saying that he could not bear such expense out of a salary of \$2,400, and it may be fairly assumed that the proceeds of the farm were devoted to that end. The farm was in the mother's name. I shall assume for the purpose of this dissent that it belonged to her both legally and equitably, although it was once in the name of James D. and was conveyed to his mother while he was yet a minor. But I can entertain no reasonable doubt upon this record but what it was the understanding of the family that James D. was to have this land. But for his contributions for more than twenty years this land could not have been kept in the family. On October 8, 1896, the mother conveyed this land to her son James D. According to Jessie's testimony, the mother talked with her about it and showed her the deed before she signed it. She signed the deed in the absence of James D. and in the presence of Jessie alone. She not only signed it, but she wrote her name in its appropriate blank space in the body of the deed. It was two or three days after she signed it before she went to the city to acknowledge it. It was acknowledged and witnessed in a formal manner. The witnesses to the deed have both testified as witnesses herein. Jessie was present with her mother. There was nothing in the conduct of the parties to attract the particular attention of the witnesses. It is shown practically without dispute that the mother, although eighty-three years of age, was

remarkably bright and intelligent and well preserved. She lived for seven years thereafter. She was not lacking in practical business experience. She had not only engaged in a store business in an early day, but she was also the post-mistress of Solon. When she came to New York in 1889, she brought with her a little over \$4,000 which she had saved out of her son's remittances. During her entire stay with her son she kept that as a fund for herself, spending none of it. Her habits of consultation on business matters are described by Jessie as follows: "Q. To whom did she go for advice and consultation in regard to any matters in which she was interested during the time she was in New York. A. My brother, and *she talked things over with me always*. Q. What were the relations between her and your brother? A. The very best, always."

There was no secrecy about the execution of the deed. It was known to each member of the family. Considering the age of the mother, the sisters, Jessie and Margaret, might well have deemed their interests affected by such a transaction. The fact that these never questioned it in any way, but acquiesced in it, as a matter of course, is a strong circumstance indicating that the conveyance was in full accord with the family understanding. That this continued to be the state of mind of Jessie for many years after her mother's death is indicated by a letter written by her in August, 1907, from which I quote as follows: "When mother deeded the land to my brother, she was not obliged to do so by law, but from a sense of justice for what he had done for her. He promised many things. My sister and I were to have a home and enough to keep us. We had nothing in writing, and I do not think he dreamed but what we would be all right. As far as I am concerned I want nothing, but my sister left a daughter who has to be kept." Going back for the moment to their early experience, the record contains a letter written in 1865 by Margaret Gray, the mother of the plaintiff, under whom plaintiff claims. I quote the following reference

therein to her brother James: "My brother did not get home until after the funeral. There are very few young men like him. He has supported the family for several years. He is surely one of earth's noblemen. My husband died four years ago the first of last January. I have a little girl eight years old. She has always been very sickly, but is getting better now. My sister Jessie is quite a large girl and is on the fair way to be a good scholar. My brother is going to give her a good education." The plaintiff herself testifies on that subject as follows: "Up to the time of my marriage as far back as my recollection goes, I always lived in the family of my grandmother. It was a matter of common knowledge that James D. Andrews was assisting in the support of the family. That is so as far back as I can recollect." Since the writing of that letter, the granddaughter Mabel, the daughter of the present plaintiff, came into the family. The history of Mabel is recited by Jessie in her testimony as follows: "She had a daughter, Mabel, who was born in 1881. Mabel came into our home when Mrs. Curtis left her husband. She was then about three or four years old, and she continued to make her home with us. She went to New York with us, was educated, and her support and education was contributed to by James D., the same as he contributed to the support of myself, my mother, and Mrs. Gray. Mabel had no property of her own. After she went to New York, her mother sent her some boxes of clothing. Aside from this, she was raised, educated, and clothed by James D." Her mother, the plaintiff herein, gives it as follows: "My mother had an income until she went to New York. She derived it from dressmaking. I visited the family in New York. They were supported by my Uncle Jim. My daughter went to the public schools and then to a boarding school at Ft. Edwards, called the Ft. Edwards Seminary. I did not send her. I could not afford it. Well, I had something to do with the education of my daughter. I paid for some of her painting lessons. I always sent Mabel money when I could, but

the fact is I was not able to pay for her education. It devolved largely on James D. Andrews. Don't know whether my daughter graduated from the public schools. The expense of sending my daughter one year to the institute was not paid by Uncle Jim. It was defrayed by the family. Uncle Jim was dead then. The last time I saw Uncle Jim was in the year of 1889, ten years before his death. I did not see my grandmother during that ten years."

The conduct of the parties subsequent to the making of the deed is very significant, not only in its acquiescence, but in disclosing their understanding of the transaction. The deed purported in terms to have been made "for several valuable considerations." Jessie discloses her mother's understanding subsequent to the execution of the deed as follows: "Q. Did you have any talk with your mother about the deed from the time it was acknowledged in New York until her death? A. Yes, sir. Q. What was it? Well, during my brother's life she always spoke with reference that he would do what was right. I know the time when my brother deeded the land in question to Mary, now Mary Armagast. I knew of the conveyance. Q. After your brother's death, did you have any talk with your mother about the land? A. Yes, sir; she talked about it. Q. What did she say? A. She thought things were always going the same as they had when my brother was alive, the house would be kept, and everything would go on the same. She thought that was understood."

About two years after the execution of the deed, James D. executed a conveyance to the land to his two children. This was known to the mother and the sister and was acquiesced in. This conveyance was not in fact delivered. But in the early part of the year 1900 and about three months before his death, while he was helpless in his sickness, he executed a conveyance to his daughter Mary, the defendant herein, and this was known to the mother and to the sisters and acquiesced in. In 1899 James D. executed a bill of sale of all the farm

products on the place to his daughter Mary. He was at that time physically helpless and unable to sign his own name except by a mark. That instrument is in evidence. It is conceded to be in the handwriting of Jessie Andrews. She prepared it and guided the hand of her brother in the making of his mark thereto. There was full acquiescence thereto. This also was known to the mother. James D. died in May 1900. The life insurance already referred to was still in force payable to his mother and was collected by her. It is surely a fair inference that this was at least one of the considerations referred to in the deed of conveyance. That this insurance figured in the mutual considerations of the family is disclosed somewhat unwittingly in the testimony of Jessie. After collecting this insurance, the mother turned it over to Jessie. This is explained by Jessie in her testimony as follows: "It was a part of my brother's wish that the insurance should be turned over to me." Jessie also received from her mother the fund of \$4,000. The dealing of the family with the daughter Mary after the death of James D. is entitled to consideration. It appears that in 1898, about the beginning of the sickness of James D., and just before he went away upon a trip for his health, a settlement was had between him and his mother whereby he executed to her his note for \$1,200. The mother held this note unpaid at the time of the death of James D. The daughter Mary paid this note. She also paid the rent on the home for several years and until after the family was broken up by the death of the mother and Margaret Gray. These performances on her part were in pursuance of the mutual understanding of the family and were in accord with the understanding of the mother as testified to by Jessie. She was under no obligation to do these things, except as she had stepped into the shoes of her father in the ownership of the land and was for that reason performing his obligations. These undertakings, therefore, ought to be considered as a part of the consideration contemplated by the parties in the recitals of the deed. After the death of James D. the wit-

ness Christy, of Iowa, visited the family with a view of becoming agent for the land. He did afterward become such agent. It appears from his testimony that Mrs. Andrews spoke of the land as "Mary's land."

There is another circumstance in this record that tends to explain why no provision was made by Mrs. Andrews for Mrs. Margaret Gray in the distribution of her estate. There was an older son, Peter, who went to California in an early day and spent his life there. He never married. At the time the deed in question was made, the plaintiff herein was in California with her Uncle Peter. He died intestate shortly thereafter leaving a substantial estate. The plaintiff received it all. Margaret Gray had been the most dependent of the family and had received the most assistance. In a sense, she brought into the family the burden of three generations. Her brother had supported not only her, but her daughter and her granddaughter. She was the least capable one of the family. According to Jessie's testimony, she received all her mother's money with the understanding that she would take care of Margaret. This was what James had done for forty years before the conveyance was made to him, and it is a fair inference from this record that he was undertaking to do so to the end. It is undisputed in this record that Mary bore every expense needed by Margaret from the time of her father's death to the time of Margaret's death.

Mrs. Andrews died in 1903. Margaret Gray died in 1906. Before the death of Mrs. Gray every statute of limitations under the laws of New York had run against an action to assail the conveyance. During all that time it had never been questioned and never was questioned until the plaintiff brought this action in 1909. The conduct of all parties interested directly or indirectly was at all times consistent with the good faith of the conveyance and was at all times inconsistent with any other theory. It seems to me that this kind of evidence ought to be more satisfactory as extrinsic proof than any mere words. The fault that I find with the majority opinion

at this point is that it has looked for words and has ignored the long years of mutual and consistent conduct of the parties. If such a transaction as this is to be called in question long years after the death of the parties thereto, I know of no more satisfactory form of evidence than the long-continued conduct of the interested parties. I feel constrained to say, therefore, that the deed in question represented the intelligent act and wish of the grantor; that it was fully understood both by the parties thereto and by the other members of the family; and that there never was a moment of misunderstanding on the subject.

The original cost of this land was about \$1,000. The conceded contributions of the young man to his mother from 1857 to 1871 alone would have paid for it more than twice over. Without these contributions, the mother must have sold it and absorbed the proceeds in living expenses. Instead of investing his money in property for himself, he gave it generously to his mother.

The law could give him no cause of action for his generosity, but the mother could. She recognized her moral obligation and distributed her property accordingly. From the parental point of view it was just.

According to Jessie's understanding, as heretofore quoted from her letter of 1907, the conveyance was made "from a sense of justice for what he had done" and upon promises of continued provision for support of the family. These promises of support were faithfully performed by James while he lived, and, after his death, by his daughter as his successor in title.

By the same arrangement the life insurance went first to the mother, and then to Jessie. If James D. had known that his daughter took nothing by his conveyance of the land to her, surely he would have made other provision for her. The only other provision he could have made for her was to make her payee of his life insurance. The mother and sisters not only availed themselves of the immediate fruits of the con-

veyance during the life of James D. and of his life insurance at his death, but they accepted thereafter years of performance by his daughter Mary. And now after the full performance, and after the death of the parties to the transaction, and after the expiration of thirteen years, it has remained for a descendant to come into the Iowa courts to ask relief against the conveyance. It seems clear to me that she is entitled to none.

II. I am not fully satisfied with the majority opinion of the question of the statute of limitations, nor am I ready to say that it is erroneous. If it is not erroneous, it is because of legislative oversight. The parties were all residents of New York. Every statute of limitations in their own state had run against them. If they were not barred in this state, it is because there is no statute of limitations applicable to them. An action could be brought twenty years hence as well as now. It is a deplorable state of the law, to say the least.

III. I am fully convinced that the action ought to be deemed barred by laches. If an action had been brought in New York to declare the conveyance fraudulent, it is clear that a plea of laches would lie as being kindred to the plea of statute of limitations. To allow the statute of limitations to run before bringing an action is *prima facie* laches. If failure to bring this action before 1909 would be deemed laches by the courts of the state of the parties to the transactions, it ought to be deemed such here. The long delay has resulted in manifest disadvantage to the defendant. Especially is this so, if she is required to support her title by positive and detailed and direct extrinsic proof. I do not care to discuss this point further than to cite two of our previous cases and adopt here what we said there. *Mathews v. Culbertson*, 83 Iowa, 434; *McBride v. Caldwell*, 142 Iowa, 228.

I would award decree to the defendant on the merits.

SHERWIN, J.—I join the above dissent of Judge Evans.

JOHN McDERMOTT, Appellee, v. HAWKEYE COMMERCIAL MEN'S
ASSOCIATION, Appellant.

Accident insurance: INTOXICATION: BURDEN OF PROOF. In an action
1 on an accident insurance policy in which it was provided that the
the association should not be liable for injuries received by the
insured when in an intoxicated condition, the burden was on the
association to show such intoxication.

Same: EVIDENCE. A non-expert may testify to the intoxicated condi-
2 tion of a person. Under the evidence the question of whether
plaintiff was intoxicated at the time of the injury was for the
jury.

Evidence: MOTION TO STRIKE. Where a substantial part of the evi-
3 dence of a witness was proper a motion to strike his entire testi-
mony should be overruled.

Appeal from Dubuque District Court.—HON. ROBERT
BONSON, Judge.

TUESDAY, JANUARY 14, 1913.

THIS is an action at law for weekly indemnity for an
alleged accident by a member against the defendant as an
accident insurance association. There was a trial to a jury
and verdict, and judgment for the plaintiff. Defendant
appeals.—*Affirmed.*

Bradford & Johnson, for appellant.

Nelson & Duffy, for appellee.

EVANS, J.—The accident in question occurred on March 30,
1910, at Dubuque. That the plaintiff was seriously injured and
was disabled for many weeks is not put in dispute under the

testimony. The defendant's claim of nonliability is based wholly upon an affirmative defense. The certificate of membership upon which liability is predicated in this case contained the provisions that the defendant "shall not be liable to any member for any indemnity or benefit for an accident while the said member is in any degree under the influence of intoxicating liquors." It was averred by the defendant that at the time of the alleged accident the plaintiff was under the influence of intoxicating liquors. The controversy of the trial turned upon this question. It appeared from the plaintiff's evidence that he was a member of the Elks' Lodge, and was at the Elks' rooms until about 11 o'clock of the night in question; that he had taken "three or four ordinary drinks out of an ordinary glass;" that these drinks covered a period of a couple of hours, the last being about fifteen minutes before his departure. Upon his departure, while going downstairs upon the middle landing, and while feeling his way for the edge of the landing, there being no light at that place, he caught his foot in such a way as to stumble and fall to the foot of the stairs. All the eyewitnesses testified that he was not under the influence of liquor to any degree. On behalf of defendant, certain medical witnesses testified hypothetically that the plaintiff must have been to some degree under the influence of the intoxicating liquors which he had drunk in the preceding two hours. And this was the state of the evidence upon which the trial court submitted the case to the jury, after overruling defendant's motion for a directed verdict.

I. The trial court instructed the jury that the plaintiff could not recover if he was under the influence of intoxicating liquors to any degree at the time of the accident. The

principal question therefore presented to us is whether the defendant was entitled to a directed verdict under the testimony. The hypothetical evidence on behalf of the defendant in the light of plaintiff's own testimony has the support

1. ACCIDENT IN-
SURANCE: in-
toxication:
burden of
proof.

of much probability. But the burden on this issue was on the defendant. Nor can the positive testimony of the eye-witnesses be ignored. We think the trial court properly held that the question should go to the jury.

II. Appellant assigns error upon the admission of the testimony of one Lang on the general ground that he was not competent to testify as an expert. We find no fair basis in the record for the argument. Lang was present at the Elks' rooms, and saw the plaintiff just before the accident, and testified from personal observation that he was not under the influence of liquor to any degree. The testimony was objected to as incompetent, and the objection was overruled. The admissibility of this kind of evidence is clearly settled by our previous decisions *State v. Cather*, 121 Iowa, 108; *Kuhlman v. Weiben*, 129 Iowa, 188.

This testimony of the witness was followed by his further examination tending to show the range of his experience and opportunities for knowledge upon such a question. Argument is directed by appellant against this line of evidence. But no objection was made to it in the court below further than a motion at the close of the examination of the witness to strike out all his testimony. Inasmuch as a substantial part of his testimony was proper, the motion was properly overruled.

III. The defendant examined Dr. Allerson as a witness. It is now urged that the trial court erroneously sustained objections to certain question propounded to this witness. From a careful reading of the abstract, we find in the record only one ruling adverse to the appellant in the examination of this witness. To one question propounded to the witness plaintiff interposed the objection that it was leading, and such objection was sustained. The question was leading and the objection was properly sustained. The argument is not directed against any specified ruling.

We think the record is free from error, and the judgment must be *Affirmed*.

**BERTHA L. KELLEY V. ROYAL NEIGHBORS OF AMERICA,
Appellant.**

Insurance: MUTUAL BENEFIT SOCIETIES: OFFICERS: APPOINTMENT:

- 1 **TENURE.** Where the by-laws of a mutual benefit society provided for the appointment of supreme instructors by the supreme officer of the society, the appointments to be approved by a board of supreme managers, and that all officers and committees should be elected for the term of three years, the appointment and approval of supreme instructors in conformity therewith constituted such persons officers, who were entitled to hold their offices for the term of three years.

Same: CONTRACT OF EMPLOYMENT: BREACH: ACTION THEREFOR.

- 2 Where an insurance society refused to perform its contract of employment with an officer and agent, to pay a stated salary per month and expenses in advance, the agent was entitled to treat the refusal as a breach of the contract and to sue therefor at once.

Same: DISCHARGE OF AGENT: EVIDENCE. Where the plaintiff as the

- 3 agent of the defendant society accepted compensation for her services for a time, as requested by the supreme officer, after the board of managers had recommended her discharge, but prior to the expiration of her term of office, the bill and voucher for such service was admissible, in an action for salary for the balance of the term; as bearing on the defense of acquiescence in the disapproval of the board to her continuing the service for the term.

Same: COMPENSATION: EVIDENCE. Where an agent of the society

- 4 was discharged from one position and given another, a witness who had held the second position was competent to state the amount that might be earned in such employment by the exercise of reasonable diligence.

Same: RECOVERY OF COMPENSATION: TENDER OF SERVICES: EVIDENCE.

- 5 Where the evidence was such as to indicate that a tender of plaintiff's services for the balance of the term would have been unavailing, the questions of whether it was necessary for plaintiff to have tendered performance in order to recover, or whether she acquiesced in her claimed discharge, were for the jury.

Same: Where the by-laws of an insurance society provided that the
6 supreme officer and board of managers should determine the salary one employed as instructor should receive, evidence that at a meeting of the board at which the supreme officer was present and participated in a resolution was adopted that no person employed as instructor should receive any salary except such as local lodges might pay, was admissible in an action for breach of the contract of employment, based on refusal of the society to pay the salary.

Same: MEASURE OF DAMAGES. In an action by a servant to recover
7 compensation for the balance of the term of employment, after an alleged improper discharge, the measure of damages is the difference between the amount she would have earned under the contract and the amount actually earned, or which might have been earned, in similar employment during that time.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

FRIDAY, JANUARY 17, 1913.

THE facts appear in the opinion. From judgment entered against it, defendant appeals.—*Reversed.*

Geo. Wambach and E. A. Enright, for appellant.

J. A. Dyer, for appellee.

LADD, J.—The defendant is a fraternal beneficiary society incorporated under the laws of Illinois, whose object is “to encourage and disseminate moral principles, to promote fraternal love, to comfort the sick in time of need, and to bestow substantial benefits upon the family, heirs, blood relations, affianced husband, affianced wife, or other person dependent on a member.” Its chief officer is known as supreme oracle, and its corporate power is vested in a board of managers consisting of five beneficial members of the society. The executive council is composed of the five managers with the supreme oracle and the supreme recorder. Section 132 of the by-laws provides that: “Supreme instructors may be appointed by the

supreme oracle, approved by the board of supreme managers, whose duty it shall be, when deemed necessary by that officer, to visit camps requiring their services, the compensation for such services to be determined by the supreme oracle and the board of supreme managers." On August 10, 1908, the record of the board of managers showed that, "after a thorough discussion in regard to the appointment of supreme instructors, motion was made that the supreme oracle appoint two supreme instructors at the salary of seventy-five dollars (\$75.00) per month and expenses, their work to be under the direction of the supreme oracle. Motion carried." "Motion made that supreme oracle be authorized to notify supreme instructors to be in attendance at the September meeting of the board. Carried." The supreme oracle designated plaintiff and another as supreme instructors, who were present at the next meeting as required, and their appointment approved by the board of managers. They were "allowed fifty dollars (\$50.00) advance expense money," and, accepting the appointments, entered upon the discharge of the duties assigned them. At a later meeting of the board a "motion was made that supreme instructors be allowed seventy-five dollars (\$75.00) per month advance expense money instead of fifty dollars (\$50.00) as heretofore. Motion carried." The plaintiff entered upon the discharge of her duties as supreme instructor, but in August, 1909, the board of managers adopted the following: "Whereas, during the present term, there have been held schools of instruction for supervising deputies, and for district deputies, and there is no immediate necessity for further instruction, and whereas, after the year's employment of supreme instructors, we feel the results do not justify the further continuance of said instructors, therefore, be it resolved, that we, the board of supreme managers, do recommend to the supreme oracle that the services of the supreme instructors be dispensed with until the supreme camp expresses itself more definitely upon this question and assigns

more definite and certain duties to said office." Later in September of the same year it resolved further: "After one year's trial as agreed upon, it is by the board of supreme managers deemed inexpedient to re-employ the present supreme instructors, Bertha L. Kelley and Lizzie M. Platt, at the expense of the society, and in case the supreme oracle shall use any person or persons as supreme instructor or supreme instructors, the person or persons so used shall receive no compensation whatever except such as local camps may contract for and pay."

I. It will be observed that in neither resolution did the board undertake to discharge plaintiff. The first purported merely to advise the supreme oracle, and the last declared it inexpedient to re-employ her. It plainly appears from section 123 of the by-laws that she had been appointed for a term of three years, or at least until the first Tuesday of July, three years following the next meeting of the supreme camp. That section reads: "All the officers and committees of the supreme camp shall be elected or appointed for the triennial term next ensuing, commencing on the first Tuesday in July next following the regular triennial meeting of the supreme camp, and shall serve until their successors are elected or appointed and duly qualified." Section 130 of the by-laws seems to relate to the appointment of officers, "not herein provided for"—that is, in the by-laws. It is said she was not an officer of the supreme camp, but the name indicates otherwise, as do the duties exacted, and there is nothing in the record to the contrary. There is no escape from the conclusion that her appointment was for the term designated in this by-law, and this seems to have been the view of the supreme oracle, whose decisions when not appealed from were binding on the order.

II. The plaintiff was paid for her services until October 1, 1909, but not since, and in this action she seeks to recover

the salary from that time during the remainder of her term, less \$233.30 she has earned. Appellant con-

2. **SAME: con-**
tract of em-
ployment;
breach: action
therefor. tends that, inasmuch as her term of office had not expired, the action is premature. Accord-

ing to the resolution, she was entitled to compensation monthly, and expenses in advance. The defendant utterly refused to perform these obligations, and, as a consequence, plaintiff might treat such refusal as a breach and sue at once. *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409; *Howay v. Going-Northrup Co.*, 24 Wash. 88 (64 Pac. 135, 6 L. R. A. (N. S.) 49, 85 Am. St. Rep. 942); Note to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 511, 26 Cyc. 998.

III. After the adoption of the resolution first quoted, the supreme oracle telegraphed the chairman of the board of managers to allow plaintiff to continue her services as supreme

3. **SAME: dis-**
charge of
agent: evi-
dence. instructor two weeks longer. This was done, and at the end of that time the chairman made out a bill for her services "as per con-

tract" and sent it with a voucher as compensation to plaintiff, who returned a receipt therefor. This bill was excluded on the theory that, as plaintiff did not indorse the bill, she was not bound by any inferences to be drawn from having received the voucher in connection therewith and receipting without comment or objection. The ruling was erroneous. The evidence was admissible as bearing on the defense of acquiescence in the disapproval of the board of managers of her continuing as supreme instructor, and the abandonment of that office.

IV. Mrs. Bentley, after having testified that she was supervising deputy, and had previously been such for three years, and knew from experience in office what was the com-

4. **SAME: com-**
pensation:
evidence. pension of a district deputy in Iowa, was asked. "Who held that office before Mrs. Kelley took charge?" This was objected to as in-

competent, irrelevant, and immaterial, and the objection sus-

tained. "Q. What could Mrs. Kelley have earned in that office as deputy supreme oracle or district deputy had she devoted her time and attention to that office in that district? A. \$75 a month, I believe, and expenses." The plaintiff objected to the question and moved to strike out the answer. The motion was sustained. This was error. The competency of the witness appeared, and the evidence was admissible as tending to show how much plaintiff could have earned in the exercise of reasonable diligence.

V. The defendant pleaded that plaintiff acquiesced in the action of the board of managers and abandoned the office of supreme instructor. The evidence disclosed that she wrote

the supreme oracle, under whose direction it
 5. SAME: recovery of compensation: tender of services: evidence. was her official duty to "visit camps requiring her services," and was advised by that

officer to await developments. This seems to have been the only time the matter of her services as supreme instructor was mentioned between them, and on September 7, 1909, the supreme oracle commissioned her as district deputy, and she earned the amount mentioned in performing the duties of that office. The supreme oracle requested the board of managers to reconsider their action October 15, 1909, and this matter was taken under advisement; and four days later she recommended that the salaries which would otherwise go to the supreme instructors be expended in paying the traveling expenses of the several supervising deputies in different states on trips to which they might be assigned by the supreme oracle "for the purpose of giving instruction to the local camps and local camp officers and deputies in the secret work of the order, and in promoting generally the growth and best interest of the society." The board of managers declined on several grounds, among which was the suggestion "that the deputies are employed to build up the society, and not to promote the political interest of any supreme officer"—indicating that the situation was not being ignored by an alert rival for supreme honors. Moreover, the evidence disclosed

that plaintiff was absent from the state in the spring of 1911. The facts recited indicate that any tender of performance on plaintiff's part likely would have proven unavailing, and therefore the jury might have found such tender unnecessary. So, too, the circumstances that nothing further occurred between plaintiff and the supreme oracle in reference to the rendition of services as supreme instructor, that she was commissioned to another office which she accepted unconditionally, and that during the unexpired term she passed part of the time resting in Wisconsin, tended to establish the defense that she had abandoned the office, and therefore this issue should have been submitted to the jury.

VI. It will be observed that, under section 132 of the by-laws, "the compensation for the services of the supreme instructors was to be determined by the supreme oracle and the board of supreme managers. "The record
6. SAME: of the board of supreme managers, at which it was resolved that, "in case the supreme oracle shall use any person or persons as supreme instructor or instructors, the person or persons so used shall receive no compensation whatever except as local camps may contract or pay," does not disclose whether the supreme oracle participated in the preliminary discussion or voted on this resolution. A member of the board of managers, after testifying that the supreme oracle was present at that meeting and that the above was the only record thereof, was asked: "At the time of the adoption of this resolution, on page 90, which is shown you, I will ask you if, in the discussion of the resolution, Mrs. Collins took any part? (Objected to as incompetent, irrelevant, immaterial, and it not being shown that Mrs. Kelley was present, and it being shown that Mrs. Collins was not a member of this board. Sustained, and defendant excepts.) Q. I will ask you whether Mrs. Collins voted on the resolution or not? (Objected to as incompetent, irrelevant and immaterial). Court: I suppose if the resolution was adopted, it was carried; I do not care who voted on it.

(Sustained, and defendant excepts.) Defendant's Counsel: I offer to prove by this witness that the adoption of this resolution, No. 1, on page 90 of Exhibit B, Mrs. Collins, the supreme oracle of the defendant, was present and discussed the resolution and voted, and did not vote in the negative. Court: I do not care anything about the discussions leading up to the resolution. If the resolution is proper to go to the jury, it is the climax; it goes or it don't go; I do not care what the discussion was previous to its adoption." Had defendant been able to make the showing proffered, it would have ended the case. The very by-laws creating the office of supreme instructor declared that compensation should be determined by the supreme oracle and board of managers. Plaintiff accepted the position with this understanding, and subject to their authority by concurrence therein to change compensation to be paid at such time or times as they might deem expedient for the good of the order. The rulings were erroneous.

VII. The plaintiff actually earned \$233.30 above expenses allowed after her appointment as district deputy. The court denied defendant the right to inquire into her expense account on the ground that her expenses had been audited and settled each month. There was no evidence of any settlement, and the ruling was erroneous. If she had paid in excess of her actual expenses, this excess should have been added to the amount of her earnings.

Again there was no testimony as to the time she devoted to the duties of the office of district deputy, save the dates of reports sent to her superior in office, and these tended to show that all of her time was not so occupied. Also it appeared that she had passed some time in Wisconsin, during which she gave up her duties. Evidence of what she could have earned had she devoted her whole time and attention to the office was excluded. It should have been admitted, and the salary, if any recovered, diminished by such sum as she

7. SAME: measure of damage

actually earned, or could have earned, as deputy or other work similar to that of supreme instructor, if this were more, by reasonable diligence during the unexpired term. *Worthington v. Oak Park Imp. Co.*, 100 Iowa, 39; *Markham v. Markham*, 110 N. C. 356 (14 S. E. 963); *Emery v. Steckel*, 126 Pa. 171 (17 Atl. 601, 12 Am. St. Rep. 857).

Though the action was begun before, it was tried after, the expiration of her term, so that, if she did not abandon the office *prima facie*, she was entitled to the salary as fixed by the supreme oracle and board of managers during the unexpired term, subject to diminution in an amount equal to what she actually earned, or could have earned if this were more in an employment of similar character. *Everson v. Powers*, 89 N. Y. 527 (42 Am. Rep. 319); *Howay v. Going-Northrup Co.*, 24 Wash. 88 (64 Pac. 135, 6 L. R. A. [N. S.] 49, 85 Am. St. Rep. 943); *Wilkinson v. Black*, 80 Ala. 329. See note to *Decamp v. Hewitt*, 43 Am. Dec. 204; 20 Am. & Eng. Ency. of Law (2d Ed.) 38; 26 Cyc. 1012.

Because of the errors pointed out, the judgment is *Reversed*.

BARBARA HARRIS, Appellee, v. N. L. HARRIS, Appellant.

DIVORCE: TRIAL DE NOVO: CRUEL AND INHUMANE TREATMENT: EVIDENCE. An action for divorce is triable anew in the appellate court on the record as made below; but where the evidence is in dispute, and the appearance and demeanor of the witnesses may have had some decisive effect on the decision of the presiding judge, the appellate court will be reluctant to disturb its finding. In this action for divorce on the ground of cruel and inhuman treatment the evidence is held to support the finding that the claims made by the plaintiff in her petition were substantially true.

Appeal from Mahaska District Court.—HON. K. E. WILLCOCKSON, Judge.

TUESDAY, FEBRUARY 11, 1913.

PLAINTIFF brings this action for a divorce and alimony, and charges cruel and inhuman treatment. Decree for plaintiff, and defendant appeals.—*Affirmed.*

W. H. Keating, for appellant.

John F. & Wm. R. Lacey, for appellee.

GAYNOR, J.—It appears from the record in this case that the plaintiff and defendant were married on or about the 27th day of January, 1909; that the defendant had been married before, his marriage with his first wife occurring in the year 1891; that she obtained a divorce from him on the ground of adultery on the 23d day of December, 1908; that, after his divorce from his first wife, he came to live with plaintiff's parents and resided with them as a boarder at their home, until his marriage with the plaintiff, a little less than a month after his divorce; that, to avoid the law prohibiting marriage within one year from the granting of the decree of divorce, plaintiff and defendant went to Missouri, and were married there. It appears that, after plaintiff's marriage to the defendant, one Ida L. Shoemaker brought an action against the defendant, the petition being filed March 10, 1909, in which she claimed damages on account of a breach of promise of marriage, alleging that the promise of marriage was made about the 25th day of December, 1908, or about two days after the first wife had obtained a divorce from him. Defendant in answer to the petition of Ida L. Shoemaker charging him with breach of promise of marriage alleged, among other things, that the said Ida L. Shoemaker was a woman of notoriously unchaste character, and had been for years, and yet admits in his answer that he rented and paid the rent for the house in which she lived for more than a year prior to January 5, 1909, and permitted

her to remain and occupy said house; that he purchased all her wearing apparel, paid her grocery bills, paid for the care and keeping of her son, and also provided for the care and keeping of her mother, and alleges that whatever relationship was sustained between him and the said Ida L. Shoemaker the same was fully paid by defendant to her. In answer to his first wife's petition in the suit in which she was granted a divorce from him on the grounds of adultery, he, under oath, denied any infidelity during his marriage with her. The plaintiff in this case predicates her right to a divorce on the grounds of cruel and inhuman treatment endangering her life. The general allegations of her petition, followed by specific instances in the support of the claim, are the using of brutal and opprobrious language to, of, and concerning her, general unkindness, mistreatment while she was sick, brutal sexual relations, excessive indulgence, all of which she claims rendered her sick, nervous, impaired her health and strength, reduced her in flesh, and, if permitted to continue, would imperil and endanger her life, all of which defendant denies. This case was tried to the court below on oral testimony. The court had the opportunity to, and did, see and observe the demeanor of the witness while upon the stand, their method of testifying, their apparent candor or otherwise, their bias or prejudice, and all other facts which go to affect the weight or credibility of the evidence given, and in this respect was in a better position to pass upon and weigh the evidence offered and submitted in support of the claims of the contending parties than it is possible for this court to be. True, this case is triable de novo here, and it is the duty of this court to decide the case upon the record here presented yet we cannot, and do not, overlook the fact that in cases of this kind the probative force of testimony depends largely upon the apparent intelligence of the witnesses, their character and candor, as they appear upon the stand in the trial of the cause, that the presiding judge, seeing and hearing the witnesses examined

before him, stands in a better position to arrive more correctly at the truth than it is possible for us to do, and, where the court sitting upon the trial appears to have acted without prejudice or bias for or against either party, it is with reluctance that we disturb its findings. Especially is this true where the evidence is close or conflicting, and the appearance and manner of the witnesses testifying might have the effect of turning the scales of justice one way or the other. See *Johnson v. Insurance Company*, 126 Iowa, 565. See *Wilkie v. Sassen*, 123 Iowa, 421.

The evidence in this case is conflicting. The trial court found for the plaintiff. No good purpose can be served in setting out the evidence upon which the court predicated its judgment. Nor do we deem it necessary to so do. The evidence is not of a character that ought to be set out at any length. Suffice it to say that we have read the evidence in detail, and our reading has satisfied us that the evidence warranted the trial court in finding that the claims made by the plaintiff in her petition were substantially true; that the defendant was a man of gross sexual appetite, dominated and controlled by his passion, and his treatment of the plaintiff, as detailed by her, was cruel and inhuman, and such as, if permitted to continue, would endanger her health and life. True, the defendant denies the plaintiff's statements, but the history of his life and conduct gives support to what she says. He says he loves the plaintiff. He said he loved his first wife, yet in his testimony he says, "I had illicit relationships with this Ida L. Shoemaker during one year," and this while living with his first wife, Edna. Do such men know what love is? Do they distinguish it from the brutal passions born of lustful desire? As he sought the Shoemaker woman, so he sought this young Austrian girl. His mental attitude towards each was the same at the beginning, and, when his passion had spent its novel force, his attitude towards her was again the same as when he abandoned the caresses of his paramour.

He loved her, not that he could give, but that he might receive. Love that is grossly sensual soon burns to ashes. He loved the plaintiff for the gross pleasure he got from her wifely submission to his brutal sensual desires, and his love for her never rose above that, and when she said, "My God! is this married life?" and, "I submitted under protest to his demands because I thought it was my wifely duty, until it became intolerable"—she painted a picture that no man can look upon and say, "This is a man," without shame and humiliation for his sex. As to the effect of the treatment she received, Dr. McClean was called and testified that he treated the plaintiff in February and January, 1911, and among other things he testified that her nervous system was showing very marked signs of nervous prostration, or nervous breakdown. She was unable to control her nerves. It was hard for her to keep her mind on any one subject, follow any line closely. She was disturbed very noticeably, and had muscular symptoms as well. The doctor does not pretend to say that these conditions were caused by her husband's treatment. This he could not know, and it was for the court to say from all the record whether it was or not. A hypothetical question was put to this doctor in the following language: "Suppose the woman was twenty-seven years old, had been married about three years, had been abused by her husband in the way of language charging that she had been unfaithful to him, that she was a bad character, and, in addition to this, had been subjected to excessive sexual relations, continuing during the menstrual period, what would you say as to whether the condition you found there on this visit, could be reasonably attributed to these circumstances?" and he answered, "Yes, it could. It could be attributed pretty closely to that." As to the facts relied upon, we think the record discloses sufficient corroboration of the plaintiff's testimony to justify the decree.

On the question of alimony, we think the judgment of the court equitable and just, and the decree of the district court is *Affirmed*.

LOUISA HAHN V. HENRY LUMPA, Appellant.

Dismissal of issues: INSTRUCTIONS. Where one count of a petition
1 is dismissed during the trial the court may properly ignore the same in its instruction to the jury.

Slander and libel: WORDS ACTIONABLE PER SE: INNUENDO. Words which
2 are slanderous in themselves do not require the allegation of an *innuendo* to explain their meaning; and even if not necessarily slanderous *per se*, still if used in a connection clearly rendering them such no *innuendo* need be alleged. Besides, the objection that no *innuendo* was pleaded cannot be first raised on appeal.

Same: MITIGATION: INSTRUCTIONS. Matters relied upon in mitiga-
3 tion of an alleged slanderous charge must be distinctly pleaded in a separate division of the answer; and in the absence of such a plea the instruction that if the words were spoken in the defamatory sense charged anger would be no defense, nor serve to mitigate the offense, was proper.

Same. DAMAGES: EVIDENCE. The defendants pecuniary condition
4 may be shown in an action for slander. In the instant case a judgment for \$500 was not excessive.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

TUESDAY, NOVEMBER 19, 1912.

SUIT to recover damages for slander. Verdict and judgment for plaintiff. The defendant appeals.—*Affirmed.*

S. K. Stevenson and Ranck & Messer, for appellant.

Remley & Calkins, for appellee.

SHERWIN, J.—The plaintiff is the wife of William Hahn and the mother of William J. Hahn. Her petition alleges that the defendant, in the presence and hearing of her husband and son and other persons, said to her son: "You are not the son of William Hahn, meaning the husband of plaintiff.

You are the son of Matt Cochran. Your mother is a whore. She whored with Matt Cochran. You are a son of a bitch. Your mother is a whore. Pap, meaning plaintiff's husband, has no sons. His children are all girls. You are Matt Cochran's son." Defendant's answer was a general denial and a specific denial that he uttered the words charged, or any words relating to or concerning her. The answer alleges that at the time the words charged were alleged to have been uttered he had a conversation with William Hahn, plaintiff's husband, and William J. Hahn, her son, in which they applied abusive language to him, and that all the words he spoke on that occasion were uttered in answer to the allegations made against him by the said William and William J. Hahn. When the trial began, there was a second count in the petition, alleging the speaking of other slanderous words at another time and place, but the appellee's counsel say that this count was dismissed before the case was submitted to the jury. This statement is not denied, and we conclude that it must be correct, because the court's instructions relate only to the time and words charged in the first count. We shall therefore treat the case as having been submitted on the first count alone.

It is manifest that, if count 2 was dismissed and the issue presented by count 1 was alone submitted to the jury, there is no merit in the appellant's contention that the court ignored the fact that there were two counts, and grouped the two causes of action in his instructions. The issue presented by count 1 was clearly and fairly stated by the court, and that was all that was necessary.

The words alleged to have been spoken concerning the plaintiff were slanderous *per se*, and an *innuendo* was not required to explain the meaning intended to be conveyed to the hearers. *Quinn v. Insurance Co.*, 116 Iowa, 522; *Kinyon v. Palmer*, 18 Iowa, 377. While the term "son of a bitch" is not necessarily slanderous *per se*, the connection in which it was

1. DISMISSAL OF
ISSUES: in-
structions.

2. SLANDER AND
LIBEL: words
actionable *per*
se: *innuendo*.

used in this case clearly made it so here, and no *innuendo* could have explained its meaning more fully. The count therefore alleged a slander, and not merely the use of malicious and wicked language, as contended by appellant. *Craver v. Norton*, 114 Iowa, 46.

Moreover, no question as to the sufficiency of the petition was raised in the district court, and hence it cannot now be raised in this court. *Weis v. Morris Bros.*, 102 Iowa, 327.

In various forms the appellant complains of the court's failure to instruct more specifically on the question of mitigation, which appellant alleges he pleaded. The statute (Code, section 3593) requires the pleading of all
 3. SAME: mitigation: instructions. matters relied upon in mitigation of damages, and this in a separate and distinct division of the answer. There is no such plea in this case. The defendant denied in his answer and all the way through the trial the speaking of the words charged. He nowhere alleged that he spoke in the heat of passion, or that he did not intend the fullest meaning that could be given the words spoken. The conversation that took place between the parties at the time in question was fully before the jury, but, as we have said, there was no plea in mitigation, and hence no occasion for the court to present such an issue to the jury. *Halley v. Gregg*, 82 Iowa, 622; *Ronan v. Williams*, 41 Iowa, 680. There being no plea in mitigation, the court correctly instructed that, if the words were spoken in the defamatory sense charged, anger would be no excuse, nor serve to mitigate the offense. *Craver v. Norton, supra*.

The criticism of instruction 7 is without merit. It was competent to show the defendant's pecuniary
 4. SAME: damages: evidence. condition. *Herzman v. Oberfelder*, 54 Iowa, 83; *Karney v. Paisley*, 13 Iowa, 89.

Complaint is made of two or three rulings on the introduction of testimony, but we find nothing of a prejudicial character therein, nor are the complaints of sufficient importance to require discussion. There is nothing in the

record from which the conclusion might be drawn that the verdict was the result of passion and prejudice, nor is the judgment for \$500, in our opinion, excessive. Parties who accuse a chaste woman of being a whore and the mother of a bastard should expect to respond liberally in damages, if they are unable to prove the truth of the charge. The judgment is *Affirmed*.

WATERLOO LUMBER COMPANY and N. J. BROWN, Appellee, v.
THE DES MOINES INSURANCE COMPANY, Appellant.

Insurance: CANCELLATION OF POLICY. A policy of insurance issued by
1 authorized agents cannot, after delivery and payment of the premium to the agents, be cancelled by a mere direction of the company to the agents to obtain a better rate or take up and return the policy for cancellation; but in the absence of notice to the insured the policy is valid, and is not subject to cancellation by the agents without notice to the insured.

Same: CONTRACT: CANCELLATION AND TRANSFER OF RISK. The issuance and delivery of a policy of insurance by authorized agents in
2 a stated sum, and payment to them of the premium, constitutes a completed contract; and thereafter the agents cease to represent the insured in any manner, and they cannot bind him by a subsequent cancellation of the policy and transfer of the risk to another company without his authority.

Same: An insurance company cannot relieve itself from liability on
3 a valid policy of insurance for a loss already incurred, by inducing the insured to accept a policy in another company issued without his authority, and affording no indemnity.

Same: ISSUANCE OF POLICY: ASSENT OF ASSURED. An agent authorized to issue policies and collect premiums has no authority to
4 issue a policy covering property already destroyed; and a policy written by him in another company as a substitute for one then existing, but not brought to the notice or knowledge of the insured until after the loss, is not a valid contract, and will not work a cancellation of the first policy.

Same: LIABILITY OF INSURER. It is essential to the validity of a
5 policy of insurance, issued by another company as a substitute for

one then existing, that the insured assent thereto; and where the assent was not procured until after the property was destroyed the insurer was not liable thereon.

Appeal: TIMELINESS OF ACTION: REVIEW. Where objection to the
6 timeliness of an action was in no manner brought to the attention of the trial court it will not be considered on appeal.

Appeal from Blackhawk District Court.—HON. F. C. PLATT,
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION at law upon a policy of fire insurance. There was judgment for plaintiff, and defendant appeals. The material facts are stated in the opinion.—*Affirmed.*

Read & Read, for appellant.

Edwards & Longley, for appellee.

WEAVER, J.—The plaintiff is a lumber dealer at Waterloo, Iowa. The defendant insurance company maintains a recording agency in that city conducted by Jameson & French. Through this agency the policy in suit was issued, and during the period named in such policy the property insured was destroyed by fire. These facts are conceded, but defendant denies liability on the grounds (1) that, when the issuance of the policy was reported by its agents, defendant rejected the risk and canceled the policy, and that same was never in fact delivered or paid for; and (2) that, in violation of a provision of said policy, the plaintiff procured other insurance upon the property without the knowledge or consent of the defendant, whereby the contract of insurance with defendant became void and of no effect.

The facts conceded or well established are as follows: Upon plaintiff's application Jameson & French, defendant's

recording agents, acting within the scope of their authority, issued the policy in suit, and received payment of the stipulated premium. This policy was issued on January 27, 1908, and duly reported by said agents to the defendant at Des Moines. Eight days later defendant addressed a letter to Jameson & French, saying that the rate was inadequate, and, unless a higher rate could be procured, they were directed to take up the policy and return it for cancellation. This demand or direction was received by Jameson & French on February 5, 1908, but was not then reported by them to the plaintiff lumber company. On the same day they entered upon their records a note of the cancellation of the policy, and directed an employee to rewrite the same risk in the Iowa Manufacturers' Insurance Company, which they also represented. Such policy was prepared not earlier than February 5, 1908, but it was antedated as of February 1, 1908, and it is not entirely clear from the record whether the instrument was executed before the property was destroyed by fire on February 7, 1908. As a matter of bookkeeping the defendant's payment of premium which had been credited to the defendant company was transferred to the credit of the Manufacturers' Company. On the morning of February 8, 1908, having learned of the fire, a representative of Jameson & French went to the manager of the plaintiff company, told him that the defendant had asked a cancellation of its policy, and that the agents had on the day before written up another in the Manufacturers' Company to take its place, and upon the strength of such alleged facts demanded an exchange of said policies. The manager replied that he only wanted what was right and to get the insurance for which he had paid, took the policy offered to him, and returned the one previously issued. Thereafter the plaintiff demanded of said agents a return of the policy sued upon and offered to surrender the policy of the Manufacturers' Company.

I. There is no evidence whatever to support the plea that the policy was never delivered or paid for. The delivery

and the payment are both shown, and neither was disputed upon the trial. We have, then, to consider

1. **INSURANCE:**
cancellation of policy. whether the policy was canceled and defendant released from liability thereon. Jameson

& French being recording agents authorized to countersign and deliver policies, it requires neither argument nor citation of authorities to support the proposition that this policy upon delivery to plaintiff became a valid contract of insurance. It is equally clear that such policy could not be effectually canceled by notice or instruction from the company to its own agents that the premium was inadequate, and that, unless a higher rate could be obtained, the policy must be taken up. The insured could, of course, authorize the agents to act for him in receiving notice of cancellation and in procuring other insurance in case his policy was thereafter canceled, but the giving of such authority in this case was nowhere shown, nor is it to be fairly implied from the record. It should also be here remembered as having material bearing upon this controversy that the defendant did not attempt nor order an unconditional cancellation of the policy. Addressing its agents under date of February 4, 1908, it called their attention to the character of the risk disapproving the rate charged as being insufficient, and adding: "We consider it well worth one and one-half per cent. for three years, fire and lightning, and unless you can obtain this rate we will ask you to very kindly take up our policy and return it to us for cancellation." This direction quite clearly contemplates an effort on the part of the agents to obtain the increased premium, and that cancellation should only follow the failure of such effort. So far as shown, the agents did not consult the plaintiff on the subject or attempt to induce it to meet the company's demand. This even without respect to the lack of due notice to the insured would seem to be not so much an act of cancellation as it was a proposition or threat of cancellation to be made upon the failure of the insured to comply with the demand for a greater premium. The case thus pre-

sented is similar in principle to the one decided in *Van Tassel v. Insurance Co.*, 151 N. Y. 130 (45 N. E. 365). There the plaintiff held a policy for \$10,000 which was renewed or extended for a year. A week later the company addressed a letter to the agent, saying the risk was declined for \$10,000, but that the company would renew for \$5,000 if wanted, and that the risk would not be held binding for more than \$5,000. No reply was made to this communication, and a loss was incurred within six days thereafter. Suit being brought, defendant sought to escape liability on the ground that the policy as issued had been canceled, and that the proposition or offer to renew for the smaller amount had not been accepted. The defense was overruled, it being held that the letter constituted no more than a proposed cancellation, and not a cancellation in fact. See, also, *Chrisman v. Insurance Co.*, 75 Mo. App. 310.

The point is made in argument that, plaintiff having applied to Jameson & French for insurance without designating any particular company in which the policy was desired, the agents were authorized to place it in any responsible company represented by them, and that, upon notice to them of the cancellation of such policy, it was within the scope of their implied authority to place the risk with some other insurer. With this contention we are unable to agree. Plaintiff did not deal with Jameson & French as mere soliciting agents to present its application to different companies in succession until one was found willing to accept the risk. They were, as we have seen, recording agents authorized to issue policies for the company. Plaintiff applied to them for insurance in a stated sum. They furnished it, and plaintiff paid for it. The contract was complete, and thenceforward these agents ceased in any manner to represent the insured. If the defendant thereafter undertook to cancel the policy, it was a new and independent transaction, in which its agents could not represent nor bind the plaintiff without special authority so

2. SAME: contract: cancellation and transfer of risk.

to do, or a previous course of dealing between such parties from which the authority may be implied. *Lumber Co. v. Dans*, 95 Wis. 226 (70 N. W. 84, 37 L. R. A. 131); *Hartford Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Commercial Co. v. Urbansky*, 113 Ky. 624 (68 S. W. 653); *Clark v. Insurance Co.*, 89 Me. 26 (35 Atl. 1008, 35 L. R. A. 276); *Partridge v. Insurance Co.*, 13 App. Div. 519 (43 N. Y. Supp. 632); *Merchants' Ins. Co. v. Shults*, 8 Kan. App. 798 (57 Pac. 306); *Snedicor v. Insurance Co.*, 106 Mich. 83 (64 N. W. 35); *Edwards v. Insurance Co.*, 101 Mo. App. 45 (73 S. W. 886); *Mutual v. Insurance Co.*, 84 Va. 116 (4 S. E. 178, 10 Am. St. Rep. 819); *Martin v. Insurance Co.*, 106 Tenn. 523 (61 S. W. 1024); *Grace v. Insurance Co.*, 109 U. S. 278 (3 Sup. Ct. 207, 27 L. Ed. 932); *Insurance Co. v. Sammons*, 110 Ill. 166; *Stilwell v. Insurance Co.*, 72 N. Y. 385; *Hermann v. Insurance Co.*, 100 N. Y. 411 (3 N. E. 341, 53 Am. Rep. 197); *Broadwater v. Lion Co.*, 34 Minn. 466 (26 N. W. 455). The precedents cited to the contrary effect—*Arnfeld v. Insurance Co.*, 172 Pa. 605 (34 Atl. 580); *Kooistra v. Insurance Co.*, 122 Mich. 626 (81 N. W. 568); *Standard Oil Co. v. Insurance Co.*, 64 N. Y. 85—and others of that class, are not in point. In each of these cases the person receiving the notice was the admitted agent or broker of the insured or the course of business between the insured and the company's agent for a considerable period had been such as to justify an implication of authority to act in the premises.

Here there is no claim of express authority, nor is there any proof of prior transactions or course of business from which a finding of implied authority could be sustained. The

3. SAME. notice to Jameson & French, not having been communicated to plaintiff till after the loss had occurred, was necessarily unavailing to relieve the defendant from its liability, unless we are required to hold as a matter of law that plaintiff's act in receiving the policy in the Manufacturers' Company and giving up the one in suit is an act which bars or estops it from denying the effectiveness

of the alleged cancellation. Counsel argued that if plaintiff had been informed of the change in the policies before the loss occurred, and had accepted the one last written in exchange for the first, he would be held to have ratified the act, and could not recover from the defendant. This is, of course, true, but it does not follow that such an exchange or attempted substitution made after the loss would have the same effect. In the case supposed by counsel the plaintiff's ratification having been made while the insured property was still in existence, the Manufacturers' Company would clearly be bound by the contract made by its agents and the defendant discharged from further liability. In the case before us, the alleged ratification cannot upon any theory be said to have taken place until after the loss occurred when the insured property had ceased to exist, and the agents could no longer bind the Manufacturers' Company by any attempt to insure it at that time. Defendant cannot relieve itself from liability for loss already occurred by inducing the insured to receive the alleged policy of another company issued without authority and affording no indemnity whatever. Decisions touching upon transactions of this kind are quite numerous.

It has frequently been held that an agent has no authority to insure property already destroyed and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered or brought to the notice of the property owner until after loss, is not a valid contract of insurance.

4. SAME: issuance of policy: assent of assured.

Stebbins v. Insurance Co., 60 N. H. 65; *Clark v. Insurance Co.*, 89 Me. 26 (35 Atl. 1008, 35 L. R. A. 276); *Kerr v. Insurance Co.*, 117 Fed. 442 (54 C. C. A. 616). In the last-cited case, as in the case at bar, the insurer in the first policy, the Phoenix Company, notified its agent to cancel it. The agent Rohrer made the entry in his books, transferred the premium credit to the Milwaukee Company, and wrote up a policy in the last-named company ready for deliverey to the insured, who was given no notice of the transaction until

after a fire had destroyed the property when an actual delivery of the policy was made. In holding that such acts did not work a cancellation of the first policy the court reviews the precedents to which we have already called attention, and says:

These cases hold that the written but undelivered policy never matured into a contract for insurance, and that liability upon the subsisting policy which was intended to be replaced was fixed by the burning of the property while it was still in force. The acts of bookkeeping of Rohrer in marking cancellation on his office record of the Phoenix Company's policy and transferring in his accounts the credit for premium from that company to the defendant company, all done in anticipation of his purposed delivery of defendant company's policy in replacement for the expected surrender of the policy of the Phoenix Company, were futile, and affected no existing rights or liabilities. *Insurance Co. v. Turnbull*, 86 Ky. 230, 237 (5 S. W. 542); *Insurance Co. v. McKenzie*, 70 Ill. App. 615, 623. In the present case it clearly appeared that at the time of the burning of the elevator the policy of the Phoenix Insurance Company was a valid contract of insurance, which had never been surrendered nor canceled; and that plaintiff, the insured, then held it as such. The policy of the defendant company was then an undelivered writing, not yet a contract, and because of the destruction of the property while it was in that condition it never became a contract.

The *Clark* case cited from the Maine court arose upon a state of facts very similar to those we have here to deal with. The plaintiff applied to the agents for insurance which they wrote in the Commercial Union Company. A few days later that company wrote the agents to cancel the policy. Without notifying the insured, they directed their clerk to write another policy in the Insurance Company of North America. That policy was antedated, as was done in this case, and credit for the premium paid was transferred to the last-named company. Before the change was reported to the insured, the property burned. Thereafter the agent induced

the insured to receive the last policy and give up the one first written, assuring him that it would be all right. As a matter of safety separate actions were brought on these policies setting up the facts of the attempted cancellation and change. Speaking with reference to the action upon the policy last issued, the court says:

The agent had no authority, express or implied, to effect any insurance for the plaintiff beyond what had already been completed. His authority was to procure for the plaintiff \$1,200 insurance in one of the companies which he represented, and, having done that to the acceptance of the plaintiff, his agency so far as the plaintiff was concerned was accomplished, and he had no authority to make further insurance on the behalf of the plaintiff. Nor was it the intention even of the agent to effect additional insurance. It was, at the most, an attempt to transfer a risk from one company to another at the instance of the company then carrying the risk and without the consent of the insured. The attempted cancellation and the effort to place the risk in the defendant company were parts of the same transaction with no consent of the assured. Unless the cancellation was valid, the second risk did not attach. It is not pretended that plaintiff was aware of any intention or attempt at cancellation until the morning after the loss occurred. Until the five days' notice provided in the policy should be given him, or until he should consent to such cancellation, the first policy would remain in force, and the second would not become operative as a legal subsisting contract.

Quite in point and to the same effect are *Massasoit v. Assurance Co.*, 125 Mass. 110; *Wilson v. Insurance Co.*, 140 Mass. 210 (5 N. E. 818); *Stebbins v. Insurance Co.*, 60 N. H. 65.

If it be said that Jameson & French, being agents of the Manufacturers' Company, its assent to the issuance of the second policy must be assumed, it is none the less true that the assent of the plaintiff was essential to the existence of a completed contract, and, if such assent was not given or procured until after the subject of

5. SAME: Liability of insurer.

insurance had been destroyed, the company would not be bound thereby. *Mutual v. Young*, 90 U. S. (23 Wall.) 85 (23 L. Ed. 152); *Michigan Pipe Co. v. Insurance Co.*, 92 Mich. 493 (52 N. W. 1070, 20 L. R. A. 277), and cases already cited. Counsel's illustration of a case in which the insurance companies dealing directly together, the second company agreeing to take the risk which is being carried by the first company and loss ensues before the policy is delivered, does not cover the case at bar. In such instance there is a complete contract of reinsurance for the benefit of the first insurer which may be enforced. But the first company is in no manner relieved from its obligation to the property owner, although it is in position to protect itself against ultimate loss by calling upon the second company for the promised indemnity. *Massasoit v. Assurance Co.*, 125 Mass. 110.

Neither company is empowered to speak or act for the holder of the first policy or to bind him to an acceptance of the second policy, and he is equally powerless to bind the second insurer by a consent given after a loss has occurred. But two cases are brought to our attention from which any apparent support for defendant's position can be extracted—*Larsen v. Insurance Co.*, 208 Ill. 166 (70 N. E. 31); *Arnfeld v. Insurance Co.*, 172 Pa. 605 (34 Atl. 580)—and a careful reading of these demonstrates that neither goes to the extent claimed for it. In the *Arnfeld* case plaintiff employed a broker to procure insurance and the broker obtained a policy from the Guardian Company. This company thereafter notified the broker of its purpose to cancel the policy within five days. Acting upon the notice, the broker at once procured a policy in the Queen Company, and notified the Guardian Company thereof, and assured it that it was relieved from further liability. The insured accepted the policy from the Queen Company, and that company conceded its liability, and paid its proportion of the loss. Action was also brought on the first policy, and the essence of the decision upon appeal in that case is that the court should have instructed the jury

that if the second policy was taken as a substitute for the first, and not merely as additional insurance, and if the second company accepted responsibility and paid its share of the loss, then the first policy should be treated as canceled, and no recovery could be had thereon. Of the soundness of this proposition there can be no dispute, and it is in no manner inconsistent with the conclusions we have above announced. The *Larsen* case, decided by the Illinois court, is substantially similar in its facts to the *Arnfeld* case, in that, after being notified of the exchange of policies, the insured not only assented thereto, but presented its claim to the substituted company, which acknowledged its liability and paid its proportion of the loss. The insured having thus received the indemnity promised in the policy last issued, the court very properly says: "It cannot now lie in him to say that there was no consideration for the surrender of the policy issued by the appellee and that appellee is not relieved from liability by that transaction." Without further consideration of the authorities, we have to say that we are quite clear that there was never any efficient cancellation of the policy issued by the defendant, nor was there a valid substitution therefor of the policy of the Manufacturers' Company. For the reasons already stated, it must be held that the defense based upon an alleged avoidance of the policy by the act of the plaintiff in procuring additional insurance is without any support in the record.

II. The defendant further insists that the judgment below must be reversed because the action was prematurely begun. This fact is said to affirmatively appear from the

printed record, a statement which the appellee questions. We have not undertaken to satisfy ourselves in that respect because it appears to be unnecessary. The objection to the timeliness of the action was not raised in pleading or by motion in arrest, nor does it appear to have been in any manner called to the attention of the trial court. Under such circumstances, it cannot be

6. APPEAL: timeliness of action: review.

raised for the first time in this court. *Peitty v. Mutual Ins. Co.*, 111 Iowa, 358; *Van Camp v. Keokuk*, 130 Iowa, 716; *Borghart v. Cedar Rapids*, 126 Iowa, 313. The objection is quite certainly not one which goes to the jurisdiction of the court, and the general rule that other objections not in any manner raised in the trial court will not be considered on appeal is so general and universal that citation of authorities in support thereof is not required. The action is at law. The burden was upon defendant to make good its several defenses, or some of them, and the findings of the trial court upon all disputed matters of fact is in favor of the plaintiff.

We find no reversible error in the record, and the judgment below is therefore *Affirmed*.

SHERWIN, J.—By mistake an opinion written upon the original submission of this case reversing the judgment below was released and published pending a petition for rehearing. See *Waterloo Lumber Co. v. Ins. Co.*, 150 Iowa, 607.

Said opinion is hereby ordered withdrawn.

BYRON V. SEEVERS, Appellee, v. THE CLEVELAND COAL CO.,
Appellant.

Agency: ACTION FOR COMMISSION: EVIDENCE. In this action for commissions for finding a purchaser for coal lands of defendant, the evidence is held to require submission of the question of whether plaintiff found a purchaser for the land, under the alleged agreement with defendant to do so for a compensation.

Instructions: DUTY OF JURY. It is the duty of the jury to follow an instruction of the court whether right or wrong.

Instructions: CONFORMITY WITH ISSUES. Where the petition alleged no agreement as to the amount of commissions to be paid for finding a purchaser for land, and there was no evidence that the reasonable value of the service was a certain percentage, but the evidence showed that a less percentage had been paid in such cases, an instruction that the measure of plaintiff's recovery was

a certain specified percentage of the purchase price was erroneous.

Agency: ACTION FOR COMMISSION: INSTRUCTION. In an action for
4 commissions for the sale of land, in which it was admitted that the price of the land was not fixed and that plaintiff did not have the exclusive right of sale, an instruction that the fact that defendant did not know that the purchasers had been communicating with plaintiff about the land was not controlling, and that plaintiff had but simply to find a purchaser able, ready and willing to buy to be entitled to his commission, was erroneous.

Same: PROCURING CAUSE: INSTRUCTION. It is the duty of the court
5 when it attempts to instruct upon a matter which the parties have raised by the evidence to give a proper instruction. Thus where there was evidence tending to show that at the time when the owner and the purchaser of land, claimed to have been produced by plaintiff, met to consider the matter, the owner was not aware that plaintiff had been corresponding with the purchaser or was instrumental in calling his attention to the lands, and the purchaser was not aware that the lands were those concerning which he and plaintiff had corresponded, the court should have instructed that if the jury so found then plaintiff could not be said to have brought the parties together, and was not the procuring cause of the sale.

Same: AGENCY CONTRACT: IMPLIED PROMISE TO PAY. Mere knowledge
6 by the owner of lands that one in his employ is performing a particular service in procuring a customer, with the expectation of receiving extra compensation, is not sufficient to raise an implied promise of the employer to pay an additional sum; the employee must go further and prove an agreement for extra compensation.

Same: ESTOPPEL: RATIFICATION: PLEADING. A contract by ratifica-
7 tion, or perhaps estoppel, may be proved under a general allegation that such a contract was made, although as a rule estoppel must be pleaded; as the question then becomes one of evidence to prove the contract rather than one of estoppel.

Evidence: DECLARATIONS AGAINST INTEREST: ADMISSIONS. Declara-
8 tions or admissions of the adverse party may always be shown, whether written or made orally; and if in writing the other party may introduce all the correspondence on the subject. But generally self-serving declarations in whatever form are inadmissible; and the mere fact that a letter remains unanswered will not constitute an admission of the statements therein. In this action let-

ters written by plaintiff to defendant after the sale, which were self-serving, were inadmissible; and unanswered letters written some time after he quit defendants employ, and which were merely descriptive of past transactions, were not admissible to support a claim against defendant for salary and commissions.

Same: INCOMPETENT EVIDENCE: WAIVER OF OBJECTION. By introducing letters written to plaintiff, in response to letters from him improperly received in evidence, defendant did not waive its right to object to the incompetency of plaintiff's letters; since it was entitled to meet its case as best it could after introduction of the incompetent evidence.

Judgments: COUNTERCLAIM. Where the trial court properly directed the jury to credit the amount found due defendant on its two items of counterclaim against the sum found due plaintiff, it was not entitled to separate judgments on such items.

Appeal from Wapello District Court.—HON. FRANK W. EICHELBERGER, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION to recover an alleged balance due on salary for certain alleged reductions obtained by plaintiff on coal options secured for defendant, and commissions for the finding of a purchaser for certain lands owned by the defendant in this state. Defendant filed an answer tendering an issue on each of these claims and setting forth certain counterclaims against the plaintiff. This counterclaim was in two counts or divisions, and thereto plaintiff filed a reply in which he admitted part of the items thereof and denied and explained certain others. On these issues the case went to a jury; the court instructing that plaintiff had not shown himself entitled to anything for salary. On the other issues, the jury found for defendant on plaintiff's claim to reductions from option prices; for the plaintiff on his claim to commissions, and for defendant on the two items of counterclaim, although the allowance on the second count was for less than was claimed. Defendant moved for judgment on

the items found in its favor on the counterclaims, but these were overruled, although the court deducted the amount of these allowances from the amount awarded plaintiff as commissions, and rendered judgment for plaintiff for the amount of these commissions so found, less the allowances to defendant on its counterclaims. Defendant alone appeals.—*Reversed and Remanded.*

McNett & McNett and J. C. Mitchell, for appellant.

S. V. Reynolds and John N. McCoy, and Jaques & Jaques, for appellee.

DEEMER, J.—As plaintiff has not appealed, the first two counts of his petition are eliminated; the first by direction of the trial court, and the second by verdict of the jury. The jury found for plaintiff on the third count, and for the defendant on the two items of counterclaim, and, after deducting the allowances on the counterclaim, judgment was rendered against defendant in the sum of \$15,357.86. Defendant's motion for a new trial was overruled, and the court taxed one-half the costs to each party. The appeal challenges many rulings of the court during the trial, and it is claimed that defendant was entitled to separate judgments on the two items allowed it by the jury on its counterclaim. That the exact issues on the third count of plaintiff's petition may be understood, it is necessary to refer to that pleading and its numerous amendments at some length. In the original petition, plaintiff alleged that, in virtue of an oral agreement between him and the defendant made on or about May 23, 1904, he was to have a 5 per cent. commission on any sale or for the procuring of a purchaser for any of the coal lands belonging to defendant; that he found a purchaser for certain tracts in Marion and Lucas counties which he had optioned for the defendant, and defendant made sales to this purchaser in September of the year 1905

for \$302,150, and that his commission thereon amounted to \$15,107.50. In an amendment to this count, he averred that his contract for commissions was made with one Glenn W. Traer, president of defendant company at Chicago, as alleged in his petition; that he procured the Consolidated Indiana Coal Company as a purchaser of the coal lands, or was instrumental in bringing purchaser and seller together: that, he interested Robert Lee and Carl Scholz, representing the purchasing company, in the lands; and that by means of his efforts with them the sales were made. In another amendment to this count he averred in substance that he, beginning in the year 1903 and continuing down to September 15, 1905, when the contract of sale was closed, was engaged in trying to find a purchaser, and that he finally succeeded in doing so, and that defendant sold the lands to the purchaser procured by him, to wit, the Consolidated Indiana Coal Company. He also averred, in this connection, that these services were extra and not covered by his regular contract of employment with defendant, and that the reasonable value of his services was 5 per cent. on the purchase price, or \$15,107.

Defendant denied that it employed plaintiff to find a purchaser for its coal lands, and further pleaded settlements with and payments to the plaintiff for services performed by him of every kind and character. It also pleaded an accord and satisfaction. In its counterclaim it asserted that plaintiff had collected \$700 in rentals for lands belonging to defendants, for which he had not accounted, and it asked judgment for that amount, less the sum of \$13.71, paid by plaintiff on account of some repairs. In another count it pleaded that plaintiff, while taking options for coal lands in Marion county for one Osgood, had wrongfully appropriated to his own use, between January and October, the sum of \$3,500, which amount was repaid by means of a loan received by plaintiff upon a note signed by a farmer with whom he had been negotiating for lands, as security, but that plaintiff failed and neglected to pay the interest on the amount used

by him, which amounted to the sum of \$263.50, and as assignee of Osgood's claim for interest it asked judgment for the amount thereof. Plaintiff admitted the receipt of the rents and said that he retained them to apply on his claim for commissions, etc. As to the second count of the counter-claim, he admitted that he borrowed the money to replace the amount retained by him because he discovered this amount was a special fund, but he denied that he should be charged with interest.

In an amendment to his petition, and doubtless to meet some of the issues tendered by the answer, plaintiff averred:

That during the time that he was performing the services earning the commissions and the rebates for which this suit is brought, Glenn W. Traer was president of the Cleveland Coal Company, and also president of the Whitebreast Fuel Company of Illinois, both of which companies were owned by the same stockholders, managed by the same board of directors, and were in fact a corporation within a corporation. So far as plaintiff understood it, the Whitebreast Fuel Company was the holding company or the agent of the defendant company, and that, while the services for which he brings this suit were rendered, as claimed by him, for the Cleveland Coal Company, whatever amounts of money were paid him for wages, commissions, or rebates were paid through the Whitebreast Fuel Company of Illinois, and receipts and vouchers were made by him to that company, but as a rule the vouchers and receipts showed the proportion of the money so paid on behalf of the Cleveland Coal Company, the defendant herein. This amendment is made simply for the purpose of more clearly getting before the court and jury the exact situation.

To this defendant answered as follows:

It admits that, during the period for which plaintiff claims additional amounts for services rendered, the said Glenn W. Traer was president of the Cleveland Coal Company, defendant, and was also president of the Whitebreast Fuel Company of Illinois, but expressly denies each and every other averment stated in said amendment to petition, except

that it further admits that the plaintiff was paid for his services in full by the Whitebreast Fuel Company of Illinois, by which company he was employed and paid, and to which company he executed his receipts and vouchers for his services.

That one of defendant's pleadings may be better understood, we here quote therefrom as follows:

The defendant says that plaintiff was paid for his services, covering the period for which he sues, by the Whitebreast Fuel Company of Illinois, by whom he was employed. . . . Defendant says that plaintiff's contract with said Whitebreast Fuel Company of Illinois for services performed by him, and for which he was paid at the rate of \$5 per day, was in parol, and was also implied from his acceptance and receipt from said Whitebreast Fuel Company of Illinois from month to month at the rate of \$5 per day, and his statements of account rendered therefor. . . . The defendant says that between March 3, 1904, and April 3, 1905, no moneys were sent by either J. C. Osgood or the defendant to the plaintiff, but between said dates the Whitebreast Fuel Company of Illinois sent the plaintiff for and on its account with such J. C. Osgood about \$59,000, and about \$13,650 for or on its account with defendant. . . . Defendant says that at the time, and for the period stated, Glenn W. Traer was the president, and J. M. Blee was the treasurer and assistant secretary, of the defendant.

In this manner we have endeavored to extract the substance of pleadings covering about thirty-eight printed pages of the abstract. In some respects the issues are simple; but in going to the record which consists of an abstract of 739 pages, amended abstracts of a few pages, and briefs and arguments aggregating over 400 pages, that which might otherwise be regarded as simple becomes exceedingly complex. Involved in the transactions disclosed by the testimony are the following organizations: The Whitebreast Fuel Company of Illinois, an Illinois corporation, the St. Paul Coal Company, an Iowa corporation, the Cardiff Coal Company,

an Illinois corporation, the Crestline Syndicate, a group of individuals operating in Polk county, or what is known as the Des Moines field, the defendant, the Cleveland Coal Company, an Iowa corporation, and the Rock Island Railway Company had a mining department and it cuts some figure in the case. In addition to these there was what is known as the Consolidated Indiana Coal Company, a corporation, the major part of whose stock and securities were held by the Rock Island Railway Company. This consolidated Indiana Coal Company was the purchaser of the lands for the sale of which plaintiff asks a commission. The deed of the lands to this company was made in September of the year 1905. Chas. A. Goodnow was general manager of the Rock Island Company. Mr. Mather was president, and a Mr. Reid was the chairman, of its board of directors, Chas. Scholz was manager of the mining department of the railway company and general manager of the Consolidated Indiana Coal Company. G. W. Traer was president of the Whitebreast Fuel Company of Illinois, and J. M. Blee was its treasurer, and that company owned property both in Illinois and Iowa, and operated the mines of both the St. Paul Company and the Cleveland Company, but each owned separate properties which were not being operated. Neither the St. Paul nor the Cleveland Company operated any mines in Iowa; the actual operation of their mines being carried on by the Whitebreast Company of Illinois. Traer was also president and general manager of the defendant company, and one Blee was treasurer. It seems that the Whitebreast Company, the St. Paul Company, and the defendant, Cleveland Company, were owned by the same parties, managed by the same board of directors, and had the same general offices. The Whitebreast Company seems to have been the operating company, and it seems that everything was cleared through the Whitebreast Company, Traer the president, said in his testimony:

All the companies (referring to the Whitebreast Fuel Company of Illinois, the Cleveland Coal Company, the St. Paul Company, and the Crestline Syndicate), were paid by or through the Whitebreast Fuel Company of Illinois; its vouchers were used; and the other companies were all operating through the Whitebreast organization, and the Whitebreast kept their bank account. All the expenses of the different companies were paid on Whitebreast vouchers, and we then charged to each company whatever was expended on its account. The Whitebreast Company from time to time had settlements and adjustments with these other companies on the amounts that were paid out for them; the entries were made right along from time to time, and the books balanced every month.

One John C. Osgood was a stockholder, probably the principal one, in both the Whitebreast and the defendant companies from the beginning down to the year 1906, and during part of the time was director and nominal treasurer; but, as already indicated, Traer was president of both companies, and had charge of the business thereof. It would seem that Osgood and Traer at one time owned practically all the stock in both companies. Osgood was a witness in the case, and he testified in part as follows:

As a result of a number of interviews and considerable correspondence with Glenn W. Traer, I authorized him to proceed to procure options in the so-called 'Belinda-Dallas field' to prospect the land if it proved valuable for coal to purchase the same, telling him that I would provide funds necessary for the expenses and purchase price of the property; the details of optioning and prospecting the property were left in Mr. Traer's hands, he reporting to me the progress of the work from time to time, and conferring with me frequently in personal interviews. In the first instance, it was my expectation to open a mine on the land, but later on I decided to dispose of my coal interest in Iowa as opportunity offered, and authorized Mr. Traer to find a purchaser for the various properties, including the 'Belinda-Dallas field.' He advised me of negotiations he had with Carl Scholz, and I authorized him to sell the 'Belinda-Dallas field' to Carl Scholz, or

the company he represented, at a price to net \$300,000. . . . I had nothing to do with the employment of Byron V. Seevers in any capacity, but was advised by Mr. Traer that Mr. Seevers was employed by the Whitebreast Fuel Company of Illinois to procure options, and that he was using him in the 'Belinda-Dallas' field at a compensation of \$5 per day and his expenses. . . . I had no personal knowledge of the employment of Byron V. Seevers, except as I was informed by Glenn W. Traer. I was not informed that he had anything to do with the prospecting or with the payment for said lands or coal rights. . . . The optioning, prospecting, purchasing, and sale of the so-called 'Belinda-Dallas' coal field was a personal operation of my own, which I conducted with my own capital, with the assistance of my business associate, Glenn W. Traer, utilizing the employees and other facilities of the corporations in Iowa in which I was interested, in the Cleveland Coal Company, and the Whitebreast Fuel Company of Illinois. I did not authorize or consent to the employment of the plaintiff in the matter of negotiating a sale or finding a purchaser for the property. I sold the property myself to Daniel G. Reid in New York without any knowledge on my part as to whether the purchase was made for himself personally or for any of the corporations in which he was interested. . . . I understood from Mr. Traer that plaintiff was employed, under his direction, to procure options on lands. I am not positive whether in the years 1903 to 1906 I held any official position with either the Cleveland Coal Company or the Whitebreast Fuel Company of Illinois. I may have been a director of one or both of those companies for a portion of the time named. . . . Glenn W. Traer resided in Chicago during that time, I think; my residence was in Redstone, Colo. The companies during the time referred to maintained their offices in the Rookery building in Chicago. Glenn W. Traer was president of both companies and had general charge of their operations. He had charge of the business of said companies in Iowa and Illinois. I have no personal knowledge of who took options in 1903, 1904, and 1905 of the coal rights in Marion county, sometimes called the Belinda-Dallas field, or who did the fieldwork, but was informed by Mr. Traer that Byron V. Seevers was employed under his direction to do some of this work. My best recollection is that the options were taken in the name of Glenn

W. Traer, and that property, when purchased, was deeded to him. Q. Do you know that when the deeds to these properties were made by the landowners they were made to Glenn W. Traer as grantee, and that Glenn W. Traer at a later date deeded them to the Cleveland Coal Company, and that the Cleveland Coal Company at a still later date deeded them to the Consolidated Indiana Coal Company? A. I have no personal knowledge, but have been so informed. Q. Please state who signed the deeds to the property in question when it was deeded to the Consolidated Indiana Coal Company, and what official position the signers occupied with the Cleveland Coal Company. A. I cannot answer this question as I never saw the deed, but presume it was signed by the proper officers of the Cleveland Coal Company. The Cleveland Coal Company did not sell the Belinda-Dallas field in Marion county direct to the Consolidated Indiana Coal Company. I sold the property to Daniel G. Reid. I cannot give the exact date the sale was made, but to the best of my recollection it was some time the latter part of July or August, 1905. Q. Did the plaintiff, Byron W. Seevers, have charge of the optioning and purchasing of the property in question in the said Belinda-Dallas field for the defendant's company during the years in question? A. He did not. Glenn W. Traer had charge of the optioning and purchasing of the property for me. I was informed by Glenn W. Traer that Seevers was in his employ for the purpose of doing field work in connection with securing options. . . . Under my direction, Glenn W. Traer had charge of the operations referred to, and, as already stated, advised me that plaintiff was in his employment, and was used by him in connection with procuring options in the Belinda-Dallas field.

This much by way of introduction.

Plaintiff claims that he made an oral contract with Traer as president and manager of the defendant company, whereby the said company agreed to pay him a commission for finding a purchaser for the options on the coal lands in Marion and Lucas counties, known as the Belinda-Dallas field, and so testified while on the witness stand. He also introduced some letters from Traer which he claims corroborated his testimony. He claims that the arrangements

were made early in the year 1903, and were brought about because of his offer from other men to enter into their employ. He further says that, pursuant to the contract, he interested the officers of the Rock Island Railway in this field, and brought about a meeting between Traer and these officers, which finally resulted in a sale of the property to the Consolidated Indiana Company, that company being practically owned by the Rock Island Company, and that the price obtained was something like \$302,000, and he asks either the sum of 5 per cent. as an agreed commission for his work or the reasonable value thereof, which he stated in his petition to be the same amount. On the other hand, defendant denies that it ever employed the plaintiff in any capacity. It says that he was employed by the Whitebreast company at an agreed compensation for his services, which did not include anything by way of commissions; that he has been paid his salary and has receipted for the same. That the land which was sold did not belong to the defendant, but to Osgood, and that neither Osgood nor any one for him ever employed plaintiff or agreed to give him any compensation for finding a purchaser for the land. It is agreed that the corporate records show a purchase of the lands in controversy by the defendant company from Osgood in October of the year 1904. But Osgood said, as will be remembered, that he used the employees of the Iowa companies in securing his options, and some of the records show that certain payments for options were charged on the books of the Whitebreast Company to the defendant company. There can be no doubt, under the testimony, that some time in the year 1903 plaintiff undertook to interest the Rock Island Railway Company, through its officers, in the coal field in question, and that he had considerable correspondence with these officials; that this continued down until the time of a meeting of Traer with these officials, some time in March of the year 1904, when it is claimed plaintiff directed the railway officials to take the matter up with Traer for the reason

that they had officers in Chicago. However this may be, Traer met these officials at the time stated at Indianapolis, during a miner's convention, and then had with him maps and plats of the field, and there entered into negotiations to sell the land. Traer says in his testimony that he never knew that plaintiff had had any correspondence with these people, and that he was not advised of that fact by the plaintiff. It is conceded by plaintiff that the price for the lands was not fixed, and that this matter was left open for negotiations between vendor and purchaser. It is significant, however, that, when representatives of the railway company came to Iowa to personally look over the property, they were met by plaintiff, or at least were accompanied by him during a part of the time they were making their investigations. There is a sharp dispute in the testimony regarding Traer's knowledge of plaintiff's efforts to induce the railway people to buy the land. But, however this may be, defendant insists that the original negotiations never amounted to anything, were entirely broken off, and were thereafter resumed without any help from plaintiff, and the sale actually made at a much lower figure than was first proposed. This much of the testimony will be sufficient to indicate in a general way the points relied upon for reversal. To be accurate, these are thirty-seven in number, but they are finally reduced to seven or eight principal points.

I. It is argued that there was not enough testimony to take the case to the jury, and that in any event there should have been a verdict for the defendant upon plaintiff's claim

for commission. We have set out enough of the record to indicate that we think the question was for a jury, and it is well established that we should not attempt to pass upon the weight of the testimony where there is a conflict therein. It may be that the preponderating weight thereof on the cold page is with the defendant, but this is not enough to justify us in reversing the case for want of evidence to sustain the verdict.

1. AGENCY: action
for com-
missions: evi-
dence.

In this connection, the trial court gave the following, among other, instructions: “(17) Before plaintiff can be allowed a commission on the sale of the Belinda coal field, he must not only prove, by a preponderance of the evidence, that he was the cause of Traer and Scholz being brought together and entering upon negotiations, each with the other, with reference to the field, but he must also prove, by a preponderance of the evidence, that defendant had authorized him to find a purchaser for the field alone and by itself, and had agreed to pay him a commission if he would find a purchaser therefor—that is, though plaintiff may have been authorized to find a purchaser for, or to sell, the field in question along with and in connection with other fields all in a lump and not separately, yet in no event can he recover a commission on the separate sale of the field in question, without first proving, by a preponderance of the evidence, that the defendant authorized him to find and produce a purchaser for the field in question alone and by itself, and agreed to pay him a commission if he should find and produce a purchaser therefor.” We have looked in vain for any testimony which would justify a verdict for plaintiff under this instruction, and plaintiff’s counsel have not pointed out any such testimony.

We do not now see why this instruction was given; but, right or wrong, it was the duty of the jury to follow it, and, had it done so, plaintiff would not have been entitled to the verdict. *Crane v. Railroad Co.*, 74 Iowa, 330; *Eggert v. Templeton*, 113 Iowa, 266; *Nichols v. Railway Co.*, 69 Iowa, 154; *Mahoney v. Dankwart*, 108 Iowa, 321.

In another instruction the court said. “(24) If you find the plaintiff entitled to recover on the third count, the measure of his recovery will be 5 per cent. on whatever amount you find the purchase price to have been, with interest at 6 per cent. from the date of the sale, and, if you so find, you will compute the interest and return your verdict for said sum in one lump

2. INSTRUCTIONS:
duty of jury.

3. INSTRUCTIONS:
conformity
with issues.

sum, as to count three of plaintiff's petition, not exceeding amount claimed in petition." This instruction cannot be sustained. It is true that plaintiff testified to an oral agreement to pay him 5 per cent. commission upon the purchase price, but he also alleged in his petition that there was no agreement as to amount, but that the reasonable value of his services was 5 per cent. There was testimony from which a jury might have found that no rate of compensation was fixed; but there was no testimony that the usual or customary rate or the reasonable value of these services was 5 per cent. True there was testimony of other sales where 5 per cent. was paid, but there was also testimony as to sales where less was paid. The question was, in any event, one for a jury, and the trial court was not justified in instructing, as a matter of law, that plaintiff was entitled to 5 per cent. on the amount of the purchase price.

II. In its sixteenth instruction the court said: "The fact, if it be a fact, that the defendant or its president, Traer, did not know that Scholz and the Rock Island people had been corresponding with Seevers about the sales of the lands is not controlling. It was no part of the contract. All he would be required to do, if you find that he was employed to find a purchaser for the lands, was to find some one who desired to purchase it, and who was ready, able, and willing to buy, or would in fact buy, and, if he did, the contract was fulfilled, regardless of defendant's information of what he had done." Under the facts disclosed and practically conceded that the price for the land was not fixed and that plaintiff did not have exclusive right of sale, this instruction was clearly erroneous.

The law on this subject is announced in the recent case of *Gilbert v. McCullough*, 146 Iowa, 333, and is as follows: "The question presented is whether, conceding the facts to be as recited, the plaintiff found a purchaser within the terms of his employment. In *Rounds v. Alee*, 116 Iowa, 345, an

4. AGENCY: ac-
tion for com-
mission: in-
struction.

agent, having been employed to find a purchaser for land at a specified price, was held to be entitled to his commission if the efficient cause in procuring a purchaser, at the price named, to whom the principal sold, even though the principal knew nothing of what had been done; the agent not having had an opportunity of informing him. And this ruling is amply sustained by authority. *Lloyd v. Matthews*, 51 N. Y. 124; *Craig v. Wead*, 58 Neb. 782 (79 N. W. 718); *Hovey v. Aaron*, 133 Mo. App. 573 (113 S. W. 718); *Graves v. Bains*, 78 Tex. 92 (14 S. W. 256); 19 Cyc. 264. This case is to be distinguished from *Rounds v. Alee*, in that the sale was for a price less than that named to the agent, and, though the latter had submitted an offer equal to that received by the owner, he had withheld the name of the proposed purchaser. Had he submitted such name, there might be some question as to defendant's liability for the agent's commission, for the circumstance might be such that the owner might not avoid such liability by reducing the price to the customer furnished. *Steward v. Mather*, 32 Wis. 344. By withholding the name of the purchaser proposed, the agent voluntarily kept from his principal the knowledge which would have enabled the latter to protect himself as well as the agent, and therefore the latter, rather than the principal, was at fault. Even though the defendant may have agreed to employ no other agent, he retained the right himself to dispose of the property. *Ingold v. Symonds*, 125 Iowa, 82. This right was not obviated by the circumstance that another may have assisted him in effecting the sale, providing it was consummated before the plaintiff found a purchaser, for the agency of the plaintiff was thereby revoked. *White v. Benton*, 121 Iowa, 354. Possibly a party having the exclusive agency might have a cause of action for damages flowing from the breach of contract in employing another agent, but no claim of that kind is made. The action is for commission earned, and not for damages, because of the owner's lapse from his agreement in other respects. The sale was consummated

by defendant prior to ascertaining that the purchaser was the same person as the one for whom the offer had been submitted. As that offer was \$75 less than the price at which he was to procure a purchaser, he did not thereby so perform as to entitle him to a commission. *Ryan v. Page*, 134 Iowa, 60. And as the sale was at a less price or one not specified in the agency agreement, and without knowledge that the purchaser was the person whose offer had been submitted by plaintiff, the defendant did not become liable to the latter for a commission. In *Boyd v. Watson*, 101 Iowa, 214, the price of the land for the sale of which the agency existed was not specified, and the court approved of an instruction that in these circumstances a sale to a customer of the agent, without knowledge of that fact, would not render the principal liable, for the commission claimed was approved. The distinction between the above case and *Rounds v. Alee* is that, in the latter, the price was named, and the sale effected at such price, while in *Boyd v. Watson* the consideration was a matter of negotiation. See, also, *Blodgett v. Railway*, 63 Iowa, 606. "Power to fix the price is incident to the right retained by the owner to sell, and an agent necessarily must take this into account, and, unless he cares to assume the risk of a sale by the owner to a prospective purchaser on terms different than those specified, he must disclose such purchaser's name in submitting his proposition. Indeed, there is an element of bad faith in withholding this information from the principal, with whom the agent is required to deal with candor and fairness, and it must not be understood from the discussion that recovery might have been had, had the sale been at the price specified in the employment of plaintiff as agent." See, also, to the same point, *Boyd v. Watson*, 101 Iowa, 214; *Blodgett v. Railroad Co.*, 63 Iowa, 606. Also the following from Indiana which seems to be a well-reasoned opinion: *Mullen v. Bower*, 22 Ind. App. 294 (53 N. E. 790).

The following instruction asked by defendant on this same proposition should have been given:

(1-a) Before plaintiff can recover a commission on account of the sale of the coal field in question, he must establish, by a preponderance of the evidence, that he produced, as a prospective purchaser, to the defendant the party that did purchase; that is, that it was through his efforts that Mr. Traer and Mr. Scholz were brought together to enter upon negotiations as to the purchase and sale. Hence if in March, 1904, Mr. Traer and Mr. Scholz met and took up the consideration of the field in question, Traer acting for the defendant in offering to sell, and Scholz acting for his company as a prospective purchaser, and if at that time Mr. Traer had no knowledge that the plaintiff had been in correspondence with Mr. Scholz concerning a coal field in Marion county, and had no knowledge that plaintiff had called, or had been instrumental in calling, Mr. Scholz's attention to a coal field for sale in Marion county, and if at that time Mr. Scholz had no knowledge that the coal field he and the plaintiff had been corresponding about was the same coal field Mr. Traer was offering for sale, then you must find that plaintiff did not bring Traer and Scholz together, and was not the producing cause of the sale in question.

The issue was in the case by reason of testimony having been introduced pro and con on this proposition, and the trial court, when it attempts to instruct upon a matter which the parties have made by the testimony, must give a proper instruction. *Hanson v. Kline*, 136 Iowa, 101.

III. The trial court also gave the following instruction:
 “(11) One acting without any authority therefor, from the owner of lands in finding a purchaser for such lands, is a mere volunteer, and in such case would not be entitled to a commission for such sale, even though his efforts may have been the efficient cause of bringing about the sale. But if the broker reports to the owner that he had begun such negotiations, and the owner of the lands knows that the broker expects a commission for obtaining such purchaser and approves the same, and makes the sale to such person with whom the broker had com-

5. SAME: procur-
ing cause: in-
struction.

6. SAME: agency
contract: im-
plied promise
to pay.

menced such negotiations, then the broker, although a mere volunteer at the commencement of the proceeding, would be entitled to a commission." As applied to the facts, we do not think this instruction can be sustained. According to plaintiff's own testimony he was, during all the time when claiming commissions for sales, in defendant's employ, and doubtless owed it his entire time and energies. Of course his employer could contract with him to pay additional compensation for finding purchasers for his coal lands; but, from mere knowledge that he was doing the work and expecting compensation, no implied promise would, as we think, arise. This proposition is ruled, we think, by *Welch v. Collenbaugh*, 150 Iowa, 695, wherein we said: "The action of plaintiff is necessarily based upon the alleged contract of employment. His petition alleged such employment. The defendant's answer denied it, and his testimony clearly negatived it. There could be an employment without any express agreement as to the rate of compensation. The contract of employment being proved, the rate of compensation could be determined on quantum meruit. But this right of compensation at all was dependent upon the question whether there was any employment of the plaintiff by the defendant to procure a purchaser for him. The defendant asked no aid of the plaintiff, and refused all his solicitations for employment. Upon such a state of facts, employment cannot be implied from the mere fact that defendant knew that plaintiff was about to take a customer to see the farm with a view of making an offer for it. A property owner is not precluded from engaging in conversation with an agent who solicits an agency from him, nor is he bound to forbid an agent to look at his property or to show it to a customer, in order to protect himself against liability." This thought was recognized by plaintiff in his pleading, for he expressly averred that his services were extra and not covered by his contract of hiring, and that the reasonable value of his services were, etc.

A contract by ratification, or perhaps estoppel, may

doubtless be proved under a general allegation that such a contract was made. *Long v. Osborn*, 91 Iowa, 160. This is

7. SAME: estop-
pel: ratifica-
tion: pleading. true, notwithstanding the rule that an estop-
pel must ordinarily be pleaded. The question
is really not one of estoppel, but of the char-

acter of testimony to prove a contract. This may be done by conduct, and facts may be shown, under a general allegation of contract, from which an implied one, or one growing out of conduct, or by ratification of the acts of another arises. See, to the same point, *Smith v. Bank*, 107 Iowa, 624; *State Bank v. Kelley*, 109 Iowa, 546; *Lull v. Bank*, 110 Iowa, 542; *Fritz v. Grain Co.*, 136 Iowa, 705. The trouble with the instruction lies, not in the fact that there was no pleading, but because, under the facts disclosed, it was erroneous as a proposition of law, for the very fundamental reason that plaintiff, as he claims, was then employed by defendant, and to recover commissions it was necessary for him to show an agreement for extra compensation.

IV. For the errors already pointed out, the judgment must be reversed, and we need not consider many of the other propositions relied upon. A vast number of letters passing between the parties named were offered and received in evidence, and to many of these defendant objected because self-serving in character and not in the form of admissions. Some of these letters were part of the *res gesta* of the sale or of the efforts put forth by the plaintiff in his claimed efforts to find a purchaser. Others were explanatory of letters received by plaintiff from various parties, and essential to a complete understanding thereof, because they were a part of the correspondence with reference to a given subject, and were admissible as a part of the correspondence about the matters referred to. Some letters written by plaintiff were introduced, over defendant's objections, which contained nothing more than narratives of past transactions, and, so far as shown, were never answered by the parties to whom they are said to have been addressed. So, too, letters from plaintiff

to various parties were put in which purported to be answers to letters addressed to him without producing these letters or accounting for their loss or destruction in order that secondary testimony as to their contents might be given.

Of course declarations against interest or admissions of an adverse party may always be shown, whether in the form of letters or made orally. And in such cases the other party may introduce all the correspondence with reference to that subject.

8. EVIDENCE:
declarations
against inter-
est: admis-
sions.

But, as a general rule, self-serving declarations, whether in the form of letters or other statements, are not admissible. And the rule seems to be that the fact that an addressee fails to answer a letter does not make the letter admissible as containing admissions by silence. *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189 (48 Am. Dec. 596); *Learned v. Tillotson*, 97 N. Y. 1-12 (49 Am. Rep. 508).

The general rule with reference to the admission of letters is as follows: " 'A letter written by a party is not admissible in his own favor, except as a notice or a demand.' 13 Am. & Eng. Ency. of Law, p. 259. Letters, written by the contractors to the city officials, did not tend to prove or disprove any issue in the case, and were clearly inadmissible. Such testimony tended to prejudice the minds of the jury against the city and in favor of the contractors. 'The mere fact that letters were received and remain unanswered has no tendency to show an acquiescence of the party in the facts stated in them. A party is not to be driven into a correspondence of that character to protect himself from such consequences.' In the case of *Firbee v. Denton*, 3 C. & P. 103, the plaintiff had sent a letter to the defendant, demanding a sum of money as due to him, to which no answer was returned. On the offer to prove its contents, . . . Lord Tenterton, C. J., observed: 'I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering the

letter is quite different, and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. I am of opinion,' he observed, 'that this letter cannot be read.' *Hill v. Pratt*, 29 Vt. 119. In *Bank v. Dalafield*, 126 N. Y. 410 (27 N. E. 797), it was said: 'We can see no ground upon which the letter is admissible. It is not in the nature of a declaration, which the defendant admits by not answering; nor is it on the same plane as an oral declaration to the same effect, made in the presence of the party to be charged, and who may be regarded as admitting its truth by failing to deny it. This letter is a mere declaration of the writer, assuming in his own behalf to characterize and determine the nature of the past transaction, and it does not demand an answer, and is not admissible in evidence against the defendant. *Learned v. Tillotson*, 97 N. Y. 1, (49 Am. Rep. 508); *Talcott v. Harris*, 93 N. Y. 567.' In *Fearing v. Kimball*, 4 Allen (Mass.) 125, (81 Am. Dec. 690), it was said: 'The general rule that a party cannot make evidence for himself by his written communications addressed to the other party as to the character of dealings between them, or the liability of the party to whom they are addressed, in the absence of any reply assenting to the same, is well settled. . . . Omitting to answer a written communication is not evidence of the truth of the facts therein stated, nor is a party under ordinary circumstances required to reply to a letter containing false statements of facts. . . . A party cannot make evidence for himself by his own declarations. . . . The omission to answer letters written to a party by a third person does not show an acquiescence in the facts there stated, as might be authorized to be inferred in the case of silence where verbal statements were made directly to him.' *Waring v. United States Tel Co.*, 4 Daly (N. Y.) 233; *Child v. Grace*, 3 C. & P. 193; 1 Greenleaf on Evidence, section 199; *Moore v. Smith*, 14 Serg. & R. (Pa.) 393; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92. In *Hammond v. Beeson*, 112 Mo. 190, (20 S. W. 474), it was said of the contents of

such a letter: 'These were declarations of a party in his own interest, and should not have been read in evidence to the jury. A party is not allowed in that manner to make evidence for himself.' In *Dempsey v. Dobson*, 174 Pa. 122, (34 Atl. 459, 32 L. R. A. 761, 52 Am. St. Rep. 816), it was said: 'The letter written after the plaintiff's color books had been returned to him, demanding that the copy that had been made should be given up to him, was inadmissible. It was an argumentative presentation of his view of his rights as an employee, and of the grievances of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf, and was no more admissible because reduced to writing than it would have been if delivered orally.' " *City v. McKechney*, 205 Ill. 372, (68 N. E. 954).

Under these rules it is clear that Exhibit 84, a letter from plaintiff to Traer, written September 12, 1905, should not have been admitted. It was written after the sale was closed and was simply self-serving in character.

The entire group of unanswered letters from plaintiff to Traer, written many months after plaintiff had quit his employment with any and all of the companies and which were narrations of past transactions, should not have been admitted. We shall not undertake to point out all the objectionable letters. It is sufficient to state the rule that the parties may be guided thereby upon a retrial of the case.

Defendant did not waive the objections by introducing letters which were written by Traer in response to some of these. It had to meet the case as best it could, and, by introducing letters of the same import, it did not make plaintiff's letters competent.

Metropolitan Bank v. Commercial Bank, 104 Iowa, 682.

V. Defendant was not entitled to separate judgments on the two items of counterclaim found in its favor. The trial court correctly directed the jury to credit the amount thereof on the sum found due the plaintiff. Whether or not upon remand, in view of plaintiff's failure to appeal, defendant is entitled to judgment on these

9. SAME: incompetent evidence: waiver of objection.

10. JUDGMENTS: counterclaim.

two items allowed it on its counterclaim, we shall not now determine. As the case stood when the matter was passed upon by the trial court, defendant was not entitled to judgment on these items. The trial court has not yet been called upon to say whether defendant is entitled to judgment because of plaintiff's failure to appeal from this allowance made by the jury on defendant's counterclaims. It will be time enough to consider that matter after the trial court has had an opportunity to pass upon it. As has already been stated, the record before us is very large, and the facts complicated. We have done our best to grasp the salient points, and conclude that there must be a reversal for the reasons stated. However, it is practically conceded that the abstract is much longer than there was any necessity for, and we have concluded to tax one hundred pages of printed matter to appellant, and it is so ordered.

The judgment must be reversed, and the cause remanded for a retrial.—*Reversed and Remanded.*

MATTIE E. VERNON, Appellee, v. IOWA STATE TRAVELING
MEN'S ASSOCIATION, Appellant.

Accident insurance: EVIDENCE: RES GESTAE. In this action upon an
1 accident policy, in which it was claimed that death resulted from blood poisoning due to an abrasion of the skin by means of a brush or other implement used by a bath attendant, the exhibition of the abrasion and the remark of deceased concerning his rough treatment while in the bathroom, made immediately following his bath, was admissible as *res gestae*. And subsequent declarations of present pain in the locality of the abrasion were also admissible as *res gestae*, and material as indicating the probable cause of death.

Same: PRIVILEGED COMMUNICATIONS. Statements of deceased made
2 to his wife and parents, both before and after he became a member of the association, concerning the condition of his health were privileged and therefore inadmissible.

Same: EXCLUSION OF EVIDENCE: PREJUDICE. The striking out of evidence concerning a fact practically conceded upon the trial is not prejudicial.

Same: CAUSE OF DEATH: BURDEN OF PROOF: INSTRUCTIONS. Where the by-laws of an accident association, providing that whenever a member in good standing dies within a certain time, the result solely of external, violent and accidental injury, are by reference made a part of the contract of insurance, the burden is upon the plaintiff to show that death resulted from such cause. But where the association claims that death resulted from one of the causes excepted by the contract, it has the burden on that issue. The instructions in this case are held to properly state the burden resting upon plaintiff to show that death was due solely to the accident, and did not result directly or indirectly in consequence of disease.

Same: CONSTRUCTION OF CONTRACT. The provision in an accident policy that there shall be no liability for an injury or death resulting in whole or in part, directly or indirectly, from disease, etc., will be construed most strongly against the association; and will be held to apply only to such diseases, or bodily or mental infirmity, as in some manner contribute, directly or indirectly, either to the injury or death.

Same. The provision of an accident policy exempting the association from liability for death resulting directly or indirectly, wholly or in part, from medical or surgical treatment, is held to cover cases of accident growing out of such treatment, and not to apply to medical or surgical treatment necessitated by an accident. But in the instant case this defense was not available to the defendant because not pleaded.

Same: REFUSAL OF INSTRUCTIONS. Where the claimed accident was an abrasion of the skin by means of a brush used by a bath attendant, and, after properly defining the terms "accident" and "accidental," the court charged that plaintiff had the burden of showing that the accident as thus described caused the death, and that it must appear from a preponderance of the evidence that death was caused proximately and solely by external, violent and accidental means, the jury could not have returned a verdict for any other cause than that claimed; and refusal to instruct that plaintiff could not recover if death was caused by an operation to relieve deceased from a sore or boil on his limb was not prejudicial.

Instructions: HARMLESS ERROR. Where a division of a pleading was withdrawn during the trial and the attention of the jury was

called to that fact, but in stating the issues the court by mistake included the same though he did not read it to the jury, and by oversight the instructions went to the jury without correction, omission to read that portion of the instruction, and a subsequent showing that the jury did not consider the same in making up their verdict, removed any possible prejudice. Moreover the instruction would not have been prejudicial if read to the jury; as the court specifically directed their attention to the issues in the main part of the charge and there made no reference to the withdrawn issue.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION at law upon a certificate of membership in the defendant association issued to Leo O. Vernon; plaintiff being the beneficiary named in said certificate. Upon issues joined, the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Sullivan & Sullivan, for appellant.

Dunshee & Haines, for appellee.

DEEMER, J.—The defendant, a mutual benefit accident association, on the 21st day of February, 1905, issued to Leo O. Vernon a certificate of membership, naming plaintiff (his wife) as beneficiary. The certificate was issued pursuant to an application of the assured in which he stated in answer to an interrogatory that he had some kidney trouble. He left unanswered a question as to whether or not he had ever had Bright's disease. Assured died on the 30th day of July, 1909, and plaintiff claims that his death was the result of blood poison due to an abrasion of skin on one of his limbs, caused by the use of a brush or other implement in the hands of a bath attendant while giving him a bath at a sanitarium in

the town of Colfax. Defendant denies that he died of blood poisoning, and claims that his death was caused or contributed to by a diseased condition of the kidneys. On these issues the case was tried to a jury with the result hitherto stated. Numerous assignments of error are made in the brief, and to such as are regarded as material we shall now devote our attention.

I. In making her case, plaintiff was permitted to prove over defendant's objections that early in the month of July of the year 1909, while she and her husband were at the sani-

tarium in Colfax, the husband went to the bathroom for a bath, and that upon his return he exhibited to her one of his limbs, disclosing an abrasion of the skin, with the remark, "I want to show you how rough that damn fool was with me in the bathroom." This testimony was properly *res gestæ* of the transaction, and there was no error in overruling defendant's objection. *N. A. Ass'n v. Woodson*, 64 Fed. 689 (12 C. C. A. 392); *Keyes v. Cedar Falls*, 107 Iowa, 509; *Insurance Co. v. Mosley*, 8 Wall. 397 (19 L. Ed. 437).

During the illness which followed and finally resulted in death, it seems that deceased was in pain from the wound, and witnesses were permitted to testify to his declarations of present pain in the limb. In this there was no error. These declarations were also part of the *res gestæ* and were material as indicating a probable cause of death.

Defendant sought to show the assured's condition of health, both prior to and after he became a member of the association, and before it is claimed he received his injuries by declarations or admissions made by him to his father and mother, and also to his wife, the plaintiff. The declarations said to have been made to his wife were absolutely privileged, and therefore inadmissible.

Our attention has not been called to any other declaration sought to be introduced; but, if such were offered, they

1. ACCIDENT IN-
SURANCE: evi-
dence: res
gestæ.

2. SAME: privi-
leged communi-
cations.

were inadmissible as against the plaintiff, unless shown to have been part of the *res gestæ*. These propositions are ruled by the *Sutcliffe v. Association*, 119 Iowa, 220, and need not be further elaborated.

Complaint is made of the striking out of some of plaintiff's testimony, and particularly of a statement made by her that her husband "was troubled with a slight kidney trouble ever since the Cedar Rapids fire." There is some doubt about whether the ruling went this far, but, if it did, there was no prejudice, for this fact was virtually conceded upon the trial. Again the witness said that her only means of knowledge was from statements made to her by her husband. Assuming that to be true, the ruling seems to be sustained in the *Sutcliffe* case, *supra*.

3. SAME: exclusion of evidence: prejudice.

Some rulings on the rejection of testimony were erroneous, but they were either fully covered by subsequent admission or were without prejudice.

II. The certificate of membership, or the articles of incorporation and by-laws which by reference were made a part of the certificate, contained the following, among other, provisions.

Art. 6, Sec. 2. Benefits: Whenever a member in good standing shall, through external, violent and accidental means, receive bodily injuries, which shall, independently of all other causes result in death within twenty-six (26) weeks from said accident, the beneficiary named in his application for membership or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of two (\$2.00) upon each member in good standing, but in no case shall said sum exceed the sum of five thousand (\$5,000) dollars, and shall be in full satisfaction of all liability to the said deceased member, his beneficiary, heirs or legal representatives.

Art. 6, Sec. 6. Benefits: Nor shall this association be liable in any manner to any member or beneficiary for any indemnity or benefit for accidental death, loss of limb, sight, disability resulting wholly or partially, directly or in-

directly, from any of the following causes, conditions or acts, or when the member is under the influence or affected by any of the conditions or acts to wit: disease, bodily or mental infirmity, medical or surgical treatment. . . . Each of the foregoing causes, conditions or acts are expressly exempted from all the provisions of these by-laws granting to members or beneficiaries thereof benefits or indemnities.

In view of these provisions, and in the light of the testimony, it is contended for appellant that the plaintiff did not

4. SAME: cause of death: burden of proof: instructions. make out a case, and that the court erred in some of its instructions; and also erred in denying certain requests made by the defend-

ant. That all these provisions became a part of the contract, and that the burden was upon plaintiff of showing that the deceased came to his death by external, violent, and accidental means, is well established by authority. *Binder v. Association*, 127 Iowa, 25; *Carnes v. Association*, 106 Iowa, 281; *Taylor v. Insurance Co.*, 110 Iowa, 621.

But it is also true that the burden was upon the defendant to show that death resulted from one of the causes excepted from the contract of membership. *Jones v. Association*, 92 Iowa, 652; *Carnes v. Association*, 106 Iowa, 281.

The trial court did not err to defendant's prejudice in instructing upon these propositions, but it is contended that it erred in giving the following:

(4) It is provided in the by-laws of the defendant association, which is a part of the contract sued on, that no benefits shall be paid for death caused wholly by disease, nor in any case except when the accidental injury was the proximate and sole cause of the death. Under the terms of this contract, the defendant is only liable in the event that death resulted solely, and independently of all other causes, from the alleged accident, and this the plaintiff must prove by a preponderance of the evidence. This provision of the by-laws of the defendant association entered into became and was at the time of the death of the said Leo O. Vernon, a part of the contract between him and the defendant association, and is

binding upon the plaintiff and the defendant association in this case. (5) If you find by a preponderance of the evidence that an accident happened to the deceased, Leo O. Vernon, by an abrasion of the skin of his left leg by the use of a brush by an attendant administering said bath, and that from such abrasion blood poison or septicæmia set in, and you further find that by virtue of this injury and the resulting blood poison, if you find there was such injury and blood poison, death resulted as the sole result thereof, then and in that event the plaintiff will be entitled to recover in this case, and you should so find by your verdict. If, however, you find that the death of the said Leo O. Vernon resulted directly or indirectly from or in consequence of disease, then there can be no recovery in this case, and your verdict in that case should be for the defendant.

Error is also predicated upon the court's failure to give the following bearing upon the same proposition:

(3) You are instructed that it is provided in the contract sued on: 'Nor shall this association be liable in any manner to any member or beneficiary for any indemnity or benefit for accidental death, loss of limb, of sight, disability resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence or affected by any such cause, condition or act, to wit: disease, bodily or mental infirmity. . . . Each of the foregoing causes, conditions or acts are expressly exempted from all the provisions of this by law granting to members or beneficiaries thereof benefits or indemnities.' You are instructed that, if at the time of the alleged injury, if you find an injury was received, the said Leo O. Vernon was in any manner affected by disease or bodily infirmity, then the plaintiff cannot recover and you should so find. (4) You are instructed that, before the plaintiff in this cause can recover, you must find, by a preponderance of the evidence, that the death of said Leo O. Vernon, independently of all other causes, was the result of external, violent, and accidental means, and if you find that other causes contributed to his death besides said injury, if you find he did receive one, then in such event the plaintiff could not recover, and you should so find. (5) You are instructed that, if you find that the

death of Leo O. Vernon was caused directly or indirectly, wholly or in part, by disease or bodily infirmity afflicting Leo O. Vernon at the time of the alleged accident, if he did receive an injury, then you are instructed that the plaintiff could not recover, and you should so find. (6) You are instructed it is claimed by the defendant association the said Leo O. Vernon prior to and at the time of his death was affected by a disease, and that his death resulted from such disease. If you find that the said Leo O. Vernon, prior to and at the time of his death, was affected by disease, and such disease contributed to his death, then said death was not accidental within the meaning of these instructions, and the plaintiff cannot recover. (7) You are instructed that the contract sued on provides: 'Nor shall this association be liable in any manner to any member or beneficiary for any indemnity or benefit for accidental death . . . resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence of or affected by any such condition or act, to wit, medical or surgical treatment.' If you find that the said Leo O. Vernon, deceased, did receive an injury in the manner alleged and stated in the petition of the plaintiff, yet if you further find that said injury was the result of medical or surgical treatment for the purpose of relieving the said Vernon from his then condition, then in that case the defendant would not be liable even if he did receive accidental injury. (9) You are instructed that if you find by a preponderance of the evidence that the sore or boil upon the left leg of Leo O. Vernon was open or incised by his attending physician, and that thereafter an infection set in by reason of such incision, then you are instructed this is not an accident for which the defendant herein would be liable, and you should so find.

In connection with those given, the following should also be considered:

(2) It appears from the record without controversy in this case that Leo O. Vernon became a member of the defendant association in the year 1905, and so continued, and was at the time of his death a member in good standing in said association; that the said Leo O. Vernon died near Bloomfield, Iowa, on the 30th day of July, 1909; and, if the plaintiff is entitled to recover in this case, the amount of her recovery will

be \$5,000, with interest at 6 per cent. per annum from the 30th day of September, 1909. You will therefore accept these as facts established in the case. (3) The plaintiff in this case claims that the said Leo O. Vernon died, at the time hereinbefore stated, from an accidental injury produced by a bath attendant rubbing the left leg of the said Leo O. Vernon so hard as to cause an abrasion of the skin, and that from such injury septicæmia or blood poison set in, which was the sole and proximate cause of his death. On the other hand, the defendant in this case claims that the deceased, Leo O. Vernon, was afflicted with disease, and that his death was caused thereby, and that therefore his death was not from an accidental injury. . . . 'Proximate cause' is the primary and efficient cause, or the moving producing cause—that is, that but for such cause the death of Leo O. Vernon would not have occurred.

Complaint is made of the instructions given, and also of the refusal to give the ones asked, and the argument in support of these complaints is that the provisions with reference to benefits which we have quoted were not correctly interpreted by the trial court. The exact claim is that the court did not succinctly state to the jury that there could be no recovery unless plaintiff showed that the death of the assured resulted from injuries received through external, violent, and accidental means, independently of all other causes; and failed to instruct that if the death resulted wholly or in part, directly or indirectly, from medical or surgical treatment, there could be no recovery. We are of the opinion that the first proposition is fairly covered by the instructions given. The jury was told that plaintiff must show the "death was caused solely and proximately by accident"; and the term "proximate cause" was defined. Again the court charged that defendant was liable only in the event that death resulted solely and independently of all other causes from the alleged accident, and specifically charged that, if the death of Vernon resulted directly or indirectly from or in consequence of disease, there could be no recovery. The instructions, as it seems to us, cast the burden upon plaintiff of show-

ing that death was due solely to the accident and did not result either directly or indirectly from, or in consequence of, disease.

While what is known as article 6, section 6, of the contract is somewhat obscure, it would not do to hold that no

5. SAME: construction of contract.

recovery could be had on the certificate if the assured was afflicted with any disease or bodily or mental infirmity, either at the time he received his injuries or at the time of death. Very few persons are free from some form of disease or bodily infirmity, and if a condition of that kind, without reference to its causal connection with death, should be held a bar to recovery, the proposed insurance would be a delusion and a snare. Such conditions as we here find are to be construed most strongly against the insurer; and, taken together, we think they must be held to apply to such diseases or bodily or mental infirmity as in some manner contribute, directly or indirectly, either to the injury or to the death. Unless there be such contribution, then the death, loss of limb, etc., cannot result either wholly or partially, directly or indirectly, therefrom. In other words, the disease or bodily infirmity must be a cause or one of the causes of the injury or death, and it is not enough to defeat recovery to show either disease or bodily or mental infirmity. *Binder v. Association*, 127 Iowa, 25. For this reason the trial court did not err in the instructions given or in refusing to give the third instruction asked. The fourth, fifth, and sixth requests were sufficiently covered in the instructions given.

There was testimony to the effect that, shortly after the assured arrived at Colfax early in the month of July, a boil or pimple about the size of a quarter was discovered upon his leg, and it also appears that an attending physician made an incision at this point in order to afford relief. The wound remained open after this incision, and it is claimed for defendant that this incised wound may have become infected and brought about the blood poisoning from which it is claimed the assured died.

It will be noticed that the provisions of the contract from which we have quoted except accidental death resulting wholly or in part, directly or indirectly, from medical or surgical treatment. The seventh request was made to direct the jury's attention to this particular provision, and it is claimed that the court erred in refusing to give it. To this there are two answers. The first is that no such defense is pleaded. An examination of the answer shows that no reference was made therein to this claimed defense.

Second, the instruction itself is fundamentally wrong in that it announces the rule of nonliability, even if the medical or surgical treatment was necessary, or thought to be necessary, for the purpose of relieving the assured from the results of an accidental injury. The provision of the bylaws quoted is somewhat obscure in its provisions regarding this matter, but we do not think it should be held that the association is not liable if the medical or surgical treatment was for the purpose of relieving the assured from the results of accidental injuries. It was undoubtedly enacted to cover cases of accident growing out of medical or surgical treatment, and should not be held to apply to such treatment which was necessitated because of an accidental injury. Either proposition is a sufficient answer to defendant's contention here.

The refusal to give the ninth request is a little more difficult to sustain. That has reference to what would be an accidental injury, and has reference to article 6, section 2, of the by-laws, rather than to article 6, section 6. It means nothing more than this: That if the insured, by reason of an operation performed upon him to relieve a sore or boil upon his leg, came to his death, then there was no accident within the meaning of the law. If it should be construed to cover the exception contained in article 6, section 6, then the court correctly refused it, for the reason that no such defense was pleaded. Giving to the instruction the only interpretation which we think it will properly bear,

7. SAME: refusal
of instructions.

we are inclined to the view that while it might well have been given, no prejudice resulted from the court's refusal to embody it in the charge. The court, after stating plaintiffs claim as set forth in instruction 3, from which we have already quoted, defined an accident as follows: "By 'accidental' is meant as the result of accident, happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected. An accident is an unexpected event which happens as by chance, which does not take place according to the usual course of things, an event which takes place without one's foresight and expectation; an undesigned, sudden, and unexpected event." And by the fifth, which we have hitherto set out, the burden was cast upon the plaintiff of showing that the claimed abrasion was an accident caused by a bath brush. The court also said in its charge that plaintiff was required to prove by a preponderance of the evidence that the death of Leo O. Vernon was caused proximately and solely by accident through external, violent, and accidental means. It is manifest that, if the jury had found there was no abrasion of the skin as claimed by plaintiff, it could not, under the instructions as given, have rendered a verdict for her. In other words, had it found that death was due to an incision made to afford relief from a sore or a boil, it would by the same mental process have determined that it was not due to the abrasion upon the leg, as claimed by plaintiff. This was the only claim of accident made by the plaintiff, and this, under the instructions, she was bound to show to justify a recovery.

III. In a reply filed by plaintiff, waiver of these conditions was pleaded because defendant knew, or should have known, of the condition of the assured's health when he was admitted to membership, and that it did in fact know, because of the reputation in the community. During the trial this division of the reply was withdrawn, and at three different times the jury's attention was directed to the matter of withdrawal. Notwithstanding this

8. INSTRUCTIONS:
harmless error.

fact, when the court prepared its instructions, it overlooked this withdrawal, and in stating the issues recited the substance of this division of the answer. When he came to read the instructions, he noticed this mistake, and did not read that part to the jury—intending, as he says, to remove that statement before sending the instructions to the jury. This, too, he failed to do, and the statement went to the jury room. After the verdict, plaintiff was permitted to show in support of the verdict that the jury did not read this part of the instruction, and did not hear the statement read. This testimony, if it were admissible, and we are inclined to think it was, removed any possible prejudice.

Aside from this, however, the error was nonprejudicial, even if read; for the jury was specifically directed in the main part of the charge to the exact issues they were to determine, and these made no reference whatever to that issue. Indeed, no reference was made thereto save in stating the issues made by the pleadings. Moreover, the jury was fully advised by counsel and through the remarks of the court that this issue was withdrawn. The thought of prejudice is distinctly negatived.

IV. There is testimony to support the verdict, and it is not for us to say that we would have arrived at a different conclusion.

Finding no prejudicial error, the judgment must be, and it is, *Affirmed*.

In Re ESTATE OF ANDREW LAW, Deceased, MARY LAW and FRANK LAW, Appellants, v. ANNA JONES, MARGARET ELLIOT and SADIE BURNS, Appellees.

Wills: CONTEST: MENTAL CAPACITY: EVIDENCE. In this will contest 1 on the ground of mental incapacity, the evidence is held sufficient to take the question of testators incapacity to the jury, and to support a finding that he was mentally incompetent when the will and codicil were executed.

Same: APPEAL: REVIEW OF VERDICT. Where there is substantial evidence in support of the finding that testator was mentally incompetent to make a will, the appellate court will not disturb the verdict on the ground of passion and prejudice.

Same: NON-EXPERT EVIDENCE. A non-expert witness may give his opinion of the mental condition of a testator, when based upon and limited to the facts first detailed by him, and which are sufficient to justify an inference of insanity.

Same: MENTAL CAPACITY: INSTRUCTION. A testator must have had sufficient strength of mind to know and comprehend the nature and extent of his property, the objects of his bounty, and the distribution he desired to make of his estate. The instruction in this case conforms to this rule.

Same: OPINION EVIDENCE: WEIGHT: INSTRUCTION. The weight to be given the evidence of expert and non-expert witnesses, as to the mental unsoundness of a testator, is a matter peculiarly within the judgment and discretion of the jury, after they have first determined whether the facts testified to by the witness are consistent with unsoundness of mind, and whether the facts recited in the hypothetical questions to the experts have been established by the evidence. The instruction on the subject as given by the court in this case was correct.

Same: REQUESTED INSTRUCTIONS. Refusal of a requested instruction, substantially covered by that given by the court, is not ground for complaint; nor was the refusal of a correct requested instruction, to the effect that the opinions of non-experts, testifying to the unsoundness of mind of testator, need not be based on detailed facts and circumstances but only on acquaintance and opportunity for observation, reversible error; the court having admitted such evidence and thus given effect to the rule, and having directed the jury to consider all the evidence in determining the issue.

Same: MENTAL CAPACITY: EVIDENCE. Evidence of the mental and physical condition and habits of the executors named in a will is admissible, as bearing on the mental condition of the testator.

Appeal from Polk District Court.—HON. JAMES P. HEWITT,
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

THIS is a contest over what purports to be the last will and testament of Andrew Law, deceased. The will was exe-

cuted in April of the year 1903, and a duly executed codicil was attached some time in the year 1909. Contestants claimed that testator was unsound of mind at the time both will and codicil were executed, and also that the execution thereof was brought about by undue influence. The case was tried to the jury upon the issue of mental capacity; the issue of undue influence having been withdrawn by the trial court. The jury returned a general verdict for contestants, and also in answer to special interrogatories found that testator was of unsound mind and mentally incompetent when the will was executed, and also at the time of the execution of the codicil. Proponents appeal.—*Affirmed.*

Bowen & Alberson and A. B. Schuetz, for appellants.

C. L. Nourse and R. G. Patton, for appellee.

DEEMER, J.—I. At the time of the execution of the will testator was about seventy-one years of age, and the codicil was executed about six years thereafter. He died in February of the year 1910 at the age of seventy-eight years. It is claimed that he was unsound of mind at the time of the execution of both will and codicil, and testimony was adduced to show that he was afflicted with *senile dementia*. As the chief point made by appellant for a reversal is the insufficiency of the testimony to take the case to the jury, and to sustain the verdict returned, we have concluded to adopt the state of facts recited in a hypothetical question put to the experts as a basis for the discussion of this proposition. It is as follows:

1. WILLS: contest: mental capacity: evidence.

Q. Doctor, we want your opinion as to the probable malady and mental soundness or unsoundness of a man who, at the age of about seventy-two years or seventy-three years, executed a written instrument, the validity of which is in controversy in this suit. About ten years prior to the execution of the instrument this man had a severe illness lasting about

six weeks; the illness coming upon him suddenly in corn-husking time and while he was working unusually hard. During the early part of the illness he was unconscious at times; his mind wandering. After the illness he walked for a time with a cane, and then with a crutch and cane, and then in later years upon crutches—two crutches—his shoulders drooped; his back was greatly bent forward, almost double; he carried his head bent; he dragged his feet as he walked; he had difficulty in getting about; he complained of headaches and of dizziness; he was at times melancholy and despondent. These conditions grew worse up to the time of his death which occurred in February, 1910. After his illness he never worked except at times for a short period doing small chores; his general health was bad; he suffered pain in various parts of his body; he was physically weak and infirm; his joints were stiff, his arteries hardened, his hands shrunken and they trembled when he attempted to use them for ordinary purposes; his vision was impaired; his hearing was impaired. Prior to his illness he had always been a strong man, upright in carriage, good health, self-reliant. After the illness he was physically as above described; he was childish, pessimistic as to his health, fretful, querulous, was restless, would wander around his premises and amongst his stock in the nighttime in his barnyard, would frequently worry over immaterial matters, and he would sit in his chair and whisper, mumble to himself, and would talk to himself and among his stock, and to his stock when he was among them, and although he was a man worth \$40,000, neighborhood of \$40,000 unincumbered property, he would worry over poverty, probably the poorhouse would be his end. He was forgetful, and asked questions and soon after repeat them, would miscall names, would tell foolish stories, sing foolish songs, and a few weeks before he executed the instrument in question his sister died, and it became necessary for him to make a sworn statement of his heirs, which consisted of his and her brothers and sisters and a nephew and niece, and he gave his own name and names of nephew and niece as the only heirs of the deceased sister, forgetting the names of two brothers and three sisters who were equal heirs with himself and entitled to a portion of the estate. His sister left a watch, and immediately after the funeral he took it and gave it to a grandchild. The parents of the grandchild told her she was not entitled to it; that her grandfather had no

right to give it to her; and she returned it to him and he became provoked—said he did have a right to give it.

This is a fairly accurate statement of what the testimony offered for contestants tended to show. And we may here pause long enough to say that the ruling on the objection to this question was correct, for there was sufficient testimony upon which to base it. *Meeker v. Meeker*, 74 Iowa, 357.

The answer made by the expert to the direct question of whether or not, assuming the facts stated to be true, testator was sound or unsound of mind was that
 2. SAME: appeal: review of verdict. he was of unsound mind. Of course this answer is not binding either upon us or the jury, but we may and should view the testimony in the light of the opinion of both experts and nonexperts. Assuming that the jury accepted this testimony as true, notwithstanding the testimony introduced by proponents which tended to show sanity, and conceding that to our minds this testimony overcame the showing made for contestants, we yet have to consider the verdict as a verity, unless the testimony be such as to indicate passion or prejudice on the part of the jury, and this we cannot do unless there be no substantial evidence in support of the verdict. *Bever v. Spangler*, 93 Iowa, 576; *Sheffield v. Hanna*, 136 Iowa, 579; *Nutter v. Insurance Co.*, 156 Iowa, 539; *Betts v. Betts*, 113 Iowa, 115; *In re Hannaher's Will*, 155 Iowa, 73. Manifestly there was such a showing here on behalf of contestants that we are not justified in interfering.

II. Various nonexpert witnesses were permitted to give their opinion as to testator's unsoundness of mind. This they did upon facts stated by them, and these opinions were properly limited to a state of facts to which they had given testimony. In this there was no error. *Stutsman v. Sharpless*, 125 Iowa, 335; *Barry v. Walker*, 152 Iowa, 154; *Betts v. Betts*, 113 Iowa, 118. It is
 3. SAME: non-expert evidence.

said, however, that in some instances the facts related were not sufficient, in themselves, to indicate insanity, and that the trial court should have sustained objections calling for these opinions on the facts so recited. Ordinarily, if there be any facts which would justify an inference of insanity, the witness is permitted to answer, and the value of the opinion is for the jury. *Barry v. Walker*, 152 Iowa, 154; *Betts v. Betts*, 113 Iowa, 118. Of course if no facts are recited which tend to show unsoundness of mind, the court should not permit the witness to give an opinion, but, in case reasonable minds might differ on the proposition, the witness should be allowed to answer, and the whole matter should go to the jury, which is the final arbiter of the facts in every case. In the light of these rules, we have examined the record upon each and all of the rulings complained of and find no error. *Stutsman v. Sharpless*, 125 Iowa, 335.

III. The trial court gave the following, among other, instructions:

(6) A person of sound mind—that is, one who has sufficient mental capacity to make a valid will—within the meaning of the law in this case, is one who has *full and intelligent knowledge* of the act he is engaged in, a *full* knowledge of the property he possesses, and intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and do business generally, nor to engage in complex and intricate business matters. If the testator had an intelligent knowledge of the nature of the instrument he was executing, and sufficient intelligence and strength of mind to know and comprehend the natural objects of his bounty, the nature and extent of his estate, and the distribution he wished to make of his property, he had sufficient mental capacity to make a will.

The italicised parts of the instruction are complained of. The instruction is fully approved in *Meeker v. Meeker*, 74 Iowa, 352, and we have never departed from the rule there announced. Taken as a whole, the words complained of are so modified and explained that the instruction as an entirety does not run counter to the rules expressed in *Re Evans' Estate*, 114 Iowa, 240, and *Perkins v. Perkins*, 116 Iowa, 253. Of course complete and perfect knowledge in the broadest sense is not required; but testator must have had strength of mind enough to know and comprehend the nature and extent of his property, the objects of his bounty, and the distribution he desired to make of his estate. This is what the court instructed, and there was no error.

IV. The following instruction is also complained of:

(13) Testimony has been given in this case consisting of opinions of nonexpert witnesses as to the unsoundness of mind of the testator, Andrew Law, and in relation thereto said witnesses have testified to certain facts and circumstances which they claim to have observed as to the acts, appearance, and conduct of said Andrew Law both before and after the times of the execution of the said will and the codicil thereto. The law requires the opinion of such witnesses to be based upon facts which are given in evidence and detailed to the jury by said witnesses before giving said opinion, and it is for you to say what weight is to be given to such opinion of any such witnesses after first determining whether the facts and circumstances testified to by him and detailed to the jury upon which said opinion is based, are consistent with unsoundness of mind as elsewhere defined in these instructions. With such limitation, the weight to be given the opinions of witnesses, both expert and nonexpert, is a matter peculiarly within your sound judgment and discretion, and you should consider, in connection therewith, the facts disclosed by those witnesses who have given opinions of unsoundness of mind, based upon their observations of the deceased as detailed in evidence, and also whether or not the facts enumerated in the hypothetical questions propounded to expert witnesses have

4. SAME: mental
capacity: in-
struction.

5. SAME: opin-
ion evidence:
weight: in-
struction.

been established by the evidence offered and admitted upon the trial.

This instruction has ample support in the cases.

V. Proponents asked the court to give two instructions, which we here quote:

(20) Evidence has been introduced in this case tending to show that Andrew Law, deceased, at the time of the making of the will in controversy involved in this action, was afflicted with a mental disease known as *senile dementia*. The fact that Andrew Law was afflicted with such disease, if you find from the evidence that it is a fact, does not necessarily mean that Andrew Law was by reason thereof incapable of making the will and codicil in controversy. A person may be insane or unsound in mind on some subjects, and be perfectly sane or sound as to others. The law is that, in order to defeat the will and codicil in this action, Andrew Law, deceased, must have been mentally incompetent to transact the very business in question, to wit, the making of the will and codicil; and if you find with reference to making such will and codicil, at the time of the making thereof, he was competent to understand, without prompting, the nature and extent of his property, the distribution he desired to make thereof, the proportionate shares he wished to make descend to those he wished to make the recipients of his bounty, and was capable of understanding who were the natural objects of his bounty, then, and in that event, your verdict will be for the proponents. (14) Testimony has been given in this cause consisting of opinions of law or nonexpert witnesses as to the unsoundness of mind of the testator, Andrew Law. In this connection you are instructed that such testimony, to be of any value must be based and based alone on facts and circumstances detailed by such witnesses to you while on the stand, showing or tending to show indications of mental unsoundness. On the other hand, opinion evidence of witnesses testifying as to the soundness of mind of the testator, Andrew Law, need not be based upon any detailed facts or circumstances given by the witness giving testimony as to such soundness, but only upon acquaintance and opportunity for observation. In determining what weight you shall give to

6. SAME: re-
requested instruc-
tions.

the opinions of lay or nonexpert witnesses testifying to the unsoundness of mind of the testator, Andrew Law, you are to take into consideration what facts upon which such witness bases his opinion, and those only, and give to such opinion such weight as you may deem them entitled to.

The substance of the first of these instructions was given by the court in its charge, and proponents have no just ground for complaint. The second announces a correct rule of evidence, and no specific instruction was given with reference to this matter. However, the court admitted such testimony, thus in effect announcing the rule of the requested instruction, and further directed the jury to consider all the testimony adduced in determining the issue submitted. We are constrained to hold that no prejudicial error resulted from the court's failure to give the second of the foregoing requests. The instruction with reference to the opinions of nonexperts who gave their opinions as to testator's insanity was correct, and such an instruction, although relating somewhat to rules of evidence, was a proper one and one favorable to proponents.

VI. Although a little out of order, we shall here consider some minor matters complained of. Contestants were permitted, over objections from proponents, to show that testator's widow could not read or write, and also that Frank Law, one of the proponents and main devisees under the will, was addicted to drink. Frank Law, and his mother, Mary Law, were named as executors of the will, and it is claimed that the testimony was admissible as bearing upon testator's strength of mind; the thought being that the parties named as executors were incompetent to act as such, which testator would have known and realized had he been of sound mind. For this purpose the testimony was admissible. In this connection the trial court gave the following instructions: "(14) Testimony has been given in this case relating to the habits of Frank Law, one of the proponents in the case and named as executor in

7. SAME: mental capacity evidence.

the will in controversy herein, with reference to his use of intoxicating liquors. You are instructed that this testimony has been admitted for the purpose of showing the relations existing between Frank Law and the deceased, Andrew Law, and as bearing upon the mental condition or capacity of the deceased testator, Andrew Law. Standing alone, such testimony is not evidence of mental incapacity, but the same may be considered by you in connection with all the other evidence admitted upon the trial bearing upon that question." Moreover, testimony as to the habits of Frank Law was admissible, as also was testimony as to the character and habits of all the other children and heirs of the testator, in determining testator's state of mind and the nature of the bounty he gave by his will. In order to judge of the nature of the will, it was important for the jury to know each and all of these matters.

VII. It is said that nonexperts as to unsoundness of mind were not confined in the questions propounded to the testimony given by them with reference to testator's conduct. An examination of the record discloses that this is a mistake. The trial court exercised great care in this matter, and we discover no error. Proponents offered the records and files of the Polk county district court, in the case of *Doubleday v. Burns*, for the purpose of explaining a matter referred to by some of the witnesses for contestants. This testimony might very well have been received; but, as the matter sought to be shown thereby was practically an admitted fact, no prejudice resulted from the ruling excluding them.

Having gone over the record with great care and found no prejudicial error, it follows that the judgment must be, and it is, *Affirmed*.

THE STATE OF IOWA, Appellee, v. WILLIAM MCKINNON, Appellant.

Criminal law: RAPE: EVIDENCE. Where the imbecility of a prosecutrix
1 for rape was clearly established, the admission of evidence that she was odd, cried without apparent reason and was lacking in will power, was not prejudicial.

Same: EVIDENCE: CROSS-EXAMINATION. Where a relative of the
2 prosecutrix had testified to her imbecility and that she was present at his home when the defendant, accused of rape, called and took her away in his buggy, the question of whether he knew at the time that defendant had paid some attention to her, was properly excluded on cross-examination; as the witness had no control over the prosecutrix, and even if he had he might rightfully have assumed that the intentions of defendant were honorable.

Same: IMMATERIAL EVIDENCE. Where a witness had testified on direct
3 examination to the age at which the prosecutrix had learned to walk, and that she had never learned to talk very plainly, his cross-examination as to the age her brothers and sisters learned to walk and talk, was properly excluded as immaterial; and even if material it was within the discretion of the court to exclude it as improper cross-examination.

Same: INSTRUCTIONS: DEFINITION OF TECHNICAL TERMS. Where a
4 criminal statute involves technical terms not within the common use and understanding of the jury, it is incumbent upon the trial court to define the same, so that the jury may clearly understand their meaning and import; but the term "effectual resistance," as used in the statute with reference to carnal knowledge of an imbecile female, has no technical legal meaning, as distinguished from its ordinary meaning, and a requested instruction defining the same was properly refused.

Same. A requested instruction that the term "effectual resistance"
5 means simply ordinary, usual and fair resistance, was properly refused; because implying an element of moderation or acquiescence in the quality of resistance which a normal woman would put forth, not contemplated by the language of the statute.

Same: IMBECILITY OF PROSECUTRIX: STATUTORY OFFENSE. On a prosecution for rape committed on an imbecile female, it is only necessary to show that her imbecility was such that effectual resistance was impossible; and when such imbecility is shown it becomes immaterial whether she did in fact resist, or what other circumstances aided in her pollution.

Same: REQUESTED INSTRUCTIONS. Where counsel desires an instruction which will aid the jury in understanding a statute difficult to render plainer by definition, it becomes his duty to formulate and present a proper instruction; it is not sufficient that attention is directed to the subject by an improper request to cast that duty upon the court.

Argument of counsel: MISCONDUCT. The conduct of attorneys in the course of their argument to the jury is peculiarly within the power and discretion of the trial court. In the instant case certain remarks of the prosecuting attorney in his closing argument are held to have been sufficiently dealt with by the sustaining of objections thereto.

Same. The conduct and actions of defendant in the presence of the jury, and while the complaining witness in a prosecution for rape was giving her testimony, may be the subject of fair and reasonable comment in argument to the jury, the propriety of which is peculiarly within the observation of the court.

Same. The appellate court will not review alleged misconduct in argument to which no exception was taken upon the trial; it is only those matters specifically brought to the attention of the trial court in some proper manner that will be considered.

Same. Whether the closing argument by the state was fairly responsive to that of counsel for defendant, even though beyond the record, is peculiarly a question for the trial court.

Same. Where the defendant did not ask for a new trial on the ground that the prosecuting attorney in his closing argument referred to the fact that he did not take the stand in his own defense, the question of whether such statement was a violation of the statute prohibiting such a reference was not for consideration on appeal.

Appeal from Hancock District Court.—HON. J. F. CLYDE,
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

INDICTMENT for rape under the provisions of section 4758 of the Code. There was a verdict of guilty and judgment entered thereon. Defendant appeals.—*Affirmed.*

John Hammill and Senneff, Bliss & Witwer, for appellant.

C. R. Wood and J. E. Wichman, for the State.

EVANS, J.—The charging part of the indictment is as follows: "The said William McKinnon on or about the 10th day of September, in the year of our Lord one thousand nine hundred and eleven, in the county aforesaid, did willfully, unlawfully, and feloniously ravish and carnally know one Jessie Glanville, then and there being, the said Jessie Glanville being then and there a girl of the age of twenty years, and naturally imbecile and weak in mind, and deficit in understanding, to such an extent that she did not know or comprehend the nature of the act, and naturally of such imbecility of mind and weakness of body as to prevent her making effectual resistance to said defendant and his unlawful act, contrary to and in violation of law and against the peace and dignity of the State of Iowa." In support of the indictment the state offered evidence tending to show that the prosecuting witness was naturally of such imbecility of mind as to come within the classification of the statute. The defendant was not a witness in his own behalf.

I. On behalf of the state, the illicit intercourse was proved by the testimony of the prosecuting witness and by corroborative evidence which was all but conclusive. On the question of the mental condition of the prosecuting witness, many witnesses, both expert and nonexpert, testified. All such testimony tended to show that the prosecuting witness was not normal in her mental development. She had considerable in-

telligence and ability to learn in school, but in all her association with others she was backward and nonresisting. She lacked initiative both in conversation and conduct. She seldom spoke except to answer questions, such answers being usually "Yes" or "No." She was industrious and obedient to any request for assistance, but her conduct was usually set in motion by some one else. She was twenty years of age at the time of the alleged offense. Her bodily condition also was abnormal. Her eyes "rolled." She had a defective spine, and walked with a "shuffling gait." All the testimony tended to show that she lacked materially in mental capacity and in resisting power. The defendant called as witnesses three medical experts, all of whom had previously made an examination of the prosecutrix. We quote from their testimony as follows:

Dr. Cole testified: I would class her on the dividing line between a low mentality and an imbecile. She had the will power to make the ordinary resistance in proportion to her intellectual power. I think she is somewhat below the average girl of her age in intelligence. She has the will power between the highest class of imbecile and the low average person. I don't think she would have the same power to distinguish between right and wrong that a girl of average mentality would have. I think her mental defects would lead her to yield to the desires and the importunities of a man asking her for sexual intercourse easier than a girl of higher mentality. Imbeciles can't resist temptations with the same degree that a person of average mentality can. The ability to converse is not always a true test of imbecility. Her physical defects are more abnormal than her mental defects. The symptoms point very strongly to a degeneration in one of the cords of the spinal column. She has enlarged tonsils and adenoids which makes it difficult for her to breathe, and causes mouth breathing.

Dr. Burke testified: She is below the average in intelligence and brightness for a girl of her age. You would probably have to class her as an imbecile. She'd be a person with a weakened intellect, but she'd be above the average of intellect of an imbecile. She'd be a high-standard imbecile. Her ability to

choose her desires would be limited according to the amount of her intellect. The fact that she stated when asked to have sexual intercourse that she was afraid she would get in a family way would indicate reasoning power and intelligence, and the fact that she refused to tell her parents would indicate the same thing. She has many physical defects. (Cross-examination): My entire testimony is based on the examination of last night. An imbecile is a person with an impaired mentality and intellect by various degrees. Most of her answers that she made us were in monosyllables. Jessie Glanville didn't have the resisting power of the average girl of her age.

Dr. Irish testified in accord with the two preceding witnesses, and also: "I think her physical defects exaggerate her mental defects."

The evidence as a whole leaves no room for reasonable doubt as to the imbecility of mind of the prosecuting witness to a noticeable degree. The defendant worked at the home of the prosecutrix for about three months prior to the illicit relation charged. He had also boarded there a short time in the previous fall. He appears to have recently come into the neighborhood. His previous history is not disclosed in the record.

Many points relating to the admission of testimony are relied upon for reversal. The testimony of the witnesses is interspersed with many statements of conclusion or opinion

as to the mental condition of the prosecutrix,
1. CRIMINAL
LAW : rape :
evidence. and the claims of error in the admission of
testimony are directed largely to these points.

One witness testified that she was "odd acting"; another that she cried much without apparent reason; others that she appeared to lack will power. We cannot undertake to pass now in detail upon these specific objections. The state of the evidence on both sides as to the imbecility of the prosecuting witness was such as we have sufficiently indicated above that no possible prejudice could result from the expressions of opinion complained of, even if they were technically improper. We are of the opinion, also, that as to

many of such opinions at least there was sufficient basis for their admission under the rules heretofore announced by us. *Reininghaus v. Association*, 116 Iowa, 364; *State v. McKnight*, 119 Iowa, 79. On the question of opinion as to will power, the medical evidence introduced by the defendant shows that imbecility of mind reduces the will power. There is nothing in the opinions of the medical witnesses of the state inconsistent with this view, and we see no ground of prejudice at this point.

II. Frank Glanville was a witness for the state. He was an uncle of the prosecutrix. She was at his house the Sunday afternoon of September 10th, when the defendant called for her. He testified briefly as to the circumstances of such call, and that the prosecutrix went away with the defendant in his buggy.

2. SAME: evidence: cross-examination.

On cross-examination, defendant's counsel put to him the following question: "You knew from what you had heard and was conscious of the fact that Sunday when he came there that he had gone with her some?" The trial court sustained an objection to this question on the ground that it was not cross-examination and hearsay. Complaint is made of this ruling. It is contended that an answer to this question would have tended to show conduct on the part of this witness inconsistent with his present testimony as to the mental weakness of the prosecutrix. It is argued that, if he had believed that she was mentally weak, he would not have permitted her to go with the defendant, and the fact that he did permit her to go with him indicated his belief in her normal mental condition. The argument assumes too much. The question was not a very important one, and was well within the discretion of the trial court to permit or refuse. The witness had no control over the prosecutrix. Even if he had been her father, he had a right to assume that the intentions of the defendant in calling for her were honorable. If they had been honorable, they might have been an aid to her recovery of normal mental condition. What is here said will

apply also to appellant's similar complaint as to the testimony of the wife of this witness.

The defendant complains, also, of the refusal of the court to permit him to cross-examine this witness as to the comparative condition of her brothers and sisters. The wit-

3. SAME: imma-
terial evi-
dence.

ness testified on direct examination that the prosecutrix had not learned to walk at eighteen months, and that she had never learned to talk plainly. He was asked on cross-examination how old the brother Vergil was when he learned to talk and walk; also how old the brother Howard was when he learned to talk and walk; and how old the other sister was when she learned to talk and walk. The trial court sustained objections to all these questions. Clearly, they were not cross-examination. The trial court held them to be immaterial.

We think in the state of the record the ruling was proper. We can see no aid to the defendant in the inquiry in this case to be had by any answer that might be given to the questions propounded. If it should appear that the other children were defective also, it could not aid the defendant. Neither would it aid him to show that they were not defective. If it were shown that they were as old as the prosecutrix when they learned to walk and talk, and were now mentally normal, it would not contradict or explain away the present condition of the prosecutrix. Even if the evidence were material for the defendant, its exclusion on the cross-examination was clearly within the discretion of the court.

III. Perhaps the most strenuous complaint of the defendant is that the trial court failed to define to the jury the statute under which he was indicted. Section 4758 of the

4. SAME: instruc-
tions: defini-
tion of tech-
nical terms.

Code is as follows: "Carnal knowledge of imbecile or insensible female. If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal

knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall be punished as provided in the section relating to ravishment." At the request of the defendant, the trial court gave to the jury the following instruction: "Before you would be warranted in finding the defendant guilty, you must be convinced beyond a reasonable doubt that the defendant did have sexual intercourse with prosecutrix as alleged, and further convinced beyond a reasonable doubt that Jessie Glanville was at such time of such imbecility of mind as to prevent effectual resistance." The defendant at the same time asked the trial court to give the following instructions:

(5) Even though you should find that Jessie Glanville was an imbecile or weak-minded, or below the ordinary girl in intelligence or will power, you would not be warranted in convicting defendant, unless such imbecility or weakness was of such an extent that by reason thereof she was prevented and unable to offer such resistance as would ordinarily be offered by the average girl of her age.

(6) Even though you should believe from the evidence that Jessie Glanville was of weak mind, but you should further find that she permitted defendant to have sexual intercourse with her because of her passions having been aroused, not induced by weakmindedness, it would be your duty to find the defendant not guilty.

(7) Effectual resistance as mentioned in the statute does not mean such entire resistance as would prevent the defendant from having sexual intercourse with her, but it means simply ordinary, usual, and fair resistance.

These latter were refused by the trial court. The point here made is not free from difficulty. It undoubtedly devolves upon the trial court to define the terms of an indictment or statute when such definition is necessary to their fair understanding by the jury. *State v. Clark*, 78 Iowa, 492; *State v. Brainard*, 25 Iowa, 572. This is particularly so when such technical terms are involved as are not within common use

and understanding of jurors. The words here involved are not technical in that sense. They have no technical legal meaning as distinguished from their ordinary meaning. They are as well understood by the ordinary juror as any synonym which could be substituted therefor. The word "resistance" could perhaps be more readily understood by a juror than the word "effectual." Surely no aid to an understanding of the word "resistance" could be given by an attempted definition thereof. According to Webster's International Dictionary, the only definition of which the word "effectual" is capable is "adequate, effective, efficient." The term "effectual" is used in the statute as a word of emphasis. "Effectual resistance" is something more than mere resistance. The implication of the statute is that the normal, virtuous woman is capable of "effectual resistance" against assault upon her virtue.

Instruction No. 7 requested by the defendant, seeks to introduce an element of moderation into the quality of the resistance. For the word "effectual" it substitutes "simply

ordinary, usual, and fair." The statute itself
 5. SAME. deals not in such distinctions, nor does it imply any element of moderation or acquiescence in the quality of the resistance which a normal woman would put forth. The trial court therefore properly refused the requested instruction No. 7. Requested instruction No. 6 is equally objectionable on a slightly different ground. It was not incumbent upon the state to show that the passions of the prosecutrix were "not induced by weak-mindedness."

It was sufficient to show that her imbecility of mind was such that "effectual resistance" was impossible. Such mental condition being shown to the satisfaction of the jury, then

the prosecutrix was within the prohibited
 6. SAME: Imbecility of prosecutrix: statutory offense. class, as much so as if she were under the age of consent or were an idiot. If she was of such imbecility of mind as to prevent effectual resistance, then it was immaterial whether she did resist or what other circumstances aided in her pollution. In such a case it is

not for the jury to speculate whether the circumstances were such that she would have yielded her virtue, even though she had not been imbecile.

We see no great objection to the requested instruction No. 5, nor can we say that the court necessarily erred in refusing it. As respects the real question at this point, it

amounted substantially to a repetition of the
 7. SAME: re-
requested instruc-
tions. statute and of the instructions already given
 by the court. The real question at this point

was the mental condition of the prosecutrix, as already stated. We do not think the requested instruction would render the statute any plainer at that point. It is not wholly free from objection, in that it is so worded as to bear a possible objectionable construction, and as to direct the mind of the jury in the wrong direction. The question for the jury was not what an average girl "would ordinarily" do under the same circumstances. It is what she could do in a moral sense, and what she would be expected to do under the demands of her virtue. We think, therefore, that the court did not err in the refusal of any of the three requested instructions on this subject.

It is urged, however, that, even though the requested instructions were not proper, the subject was brought to the attention of the court in such a way as to impose upon it the duty of a proper instruction involving a definition of the statute. In view of the manifest difficulty and apparent impossibility of making the statute any plainer by definition, we think it devolved upon counsel to formulate and present a proper instruction which would aid in an understanding of the statute.

IV. In the closing argument to the jury, the prosecuting attorney used the following language: "It is practically admitted that he committed this crime." This state-

ment was objected to by counsel for the de-
 8. ARGUMENT OF
COUNSEL: mis-
conduct. fense as improper and unfair, and the objec-
 tion was sustained by the court. Later in the

argument the following was said: "While she is telling her

story of shame and disgrace, the defendant sits here smiling, grinning at her, apparently gloating over his conquest." This was objected to as "improper, and as referring to something that cannot be in the record." No direct ruling was made upon this objection. Later in the argument the following occurred: "They want you to say that he is a poor homeless boy; that he has got an imaginary father and mother somewhere. I think, if counsel would imagine a little more correctly, they would imagine a deserted wife and children somewhere instead of a father. Mr. Senneff: Just a moment; your honor, we object to such a statement as that as misconduct on the part of the state's attorney in closing argument, and ask that the jury be admonished not to consider such statement. Court: I think that objection should be sustained. The jury should not pay any attention to the statement made by counsel." Complaint is made of the statements in argument above quoted. The conduct of attorneys in the course of argument is a matter peculiarly within the discretion and power of the trial court. As to the first and third of the above complaints, we think they were fairly and sufficiently dealt with by the trial court. The last statement particularly purports to have been made in response to statements in argument by defendant's counsel. The trial court was in a position to know how much justification or mitigation there was for the purported response of the county attorney.

As to the second complaint, the propriety of the argument was peculiarly within the observation of the court. If the defendant conducted himself in the manner stated while the prosecutrix was upon the stand, he was necessarily subject to the observation of the jury, nor do we see any fair reason why reasonable comment upon such conduct might not be made in argument to the jury.

V. In the foregoing paragraph, we have confined our consideration to those parts of the argument of the county

attorney to which objection was made at the trial. Objections

are now urged here to considerable portions
10. SAME. of such argument to which no objection ap-

pears to have been made in the trial court. The closing address of the county attorney was taken down in full in shorthand, and was included as part of the record. It is presented to us in full. Several portions of it are singled out in argument, and urged upon our attention as grounds of reversal. The record does not disclose that any of these passages were made the basis of a complaint or a ground of motion for a new trial in the court below. The motion for a new trial presented twenty-three grounds or paragraphs. The twenty-third paragraph was as follows: "Misconduct of the prosecuting attorney in closing argument." So far as appears in this record, the only misconduct to which the attention of the trial court was directed either by motion for new trial or otherwise was that which we have already considered in the preceding paragraph. The argument of the county attorney cannot be brought here for original review. We will only consider those portions thereof which were presented to the consideration of the trial court. It is perhaps true that it was not necessary for the appellant to renew repeated objections to the argument of the county attorney. But it was necessary for him in some way at some time to bring his specific complaint as to alleged misconduct to the notice of the trial court. The twenty-third paragraph of the motion for a new trial did not purport to go beyond the objections and exceptions already made.

We may say, also, that such portions of the closing argument as are complained of purported to be in response to statements of counsel for defendant in argument. Such argu-

ments were not presented. Whether such clos-
11. SAME. ing argument was fairly responsive to what

had been said by counsel for defendants, even though beyond the record, was peculiarly within the observation and knowledge of the trial judge. It is sometimes true in the trial of

criminal cases that the county attorney is not the first offender along that line. In view of the state of the record as indicated, we will not undertake to review further the closing argument.

It is suggested in argument that the defendant did not become a witness in his own behalf, and that he was therefore prejudiced by the statement that the crime was practically ad-

mitted. The defendant, however, asked an instruction on that subject, which the court gave.

12. SAME.

If this statement of the closing argument should be deemed a violation of the provisions of section 5484, then defendant was entitled to a new trial for that cause alone under the provisions of such section. But the defendant did not ask for a new trial on that ground. That question is therefore eliminated from our consideration. The foregoing disposes of the principal matters pressed upon our attention. The case is one of great importance. We are satisfied upon the record that the defendant has had a fair trial, and that the evidence of his guilt is practically conclusive.

The judgment entered below is therefore *Affirmed*.

JOHN KECKEVOET, Appellant, v. CITY OF DUBUQUE and J. H. CARROLL, Appellees.

Municipal corporations: WHARVES: FEES. The right of a city to
1 impose wharfage fees within its jurisdiction does not depend solely upon the expense it has incurred in the maintenance of the wharf; as the question of such expense is dependent largely on the condition of the water front. In the instant case, however, the evidence shows an improvement to some extent of the natural conditions.

Same: MUNICIPAL POWER: UNREASONABLE FEES: EVIDENCE. The im-
2 position of reasonable wharfage fees by a city is a valid exercise of police power, and not an interference with interstate commerce; but this power cannot be used for the imposition of a tonnage tax, or a port wardens fee, or other ulterior purposes.

Same: ENFORCEMENT OF POWER: ISSUES. Although failure to pay
3 the wharfage fees resulted simply in a demand by the city for a
removal of house boats, and payment of the fees prevented their
removal, the question of the reasonableness of the wharfage charges
was properly before the court.

Same: USE OF HARBOR: DISCRIMINATION. While a city has power to
4 enact ordinances providing reasonable regulations for the use of
a harbor, it cannot select some particular craft and prohibit its
use of the harbor, except for some sound reason of public policy.

Actions: MISJOINDER OF CAUSES. An ordinary law action cannot be
5 joined with an action in equity; and when tendered by an amend-
ment it should be stricken on motion. In this action to enjoin
the enforcement of an ordinance relating to wharfage fees, an
amendment alleging payment of the fees under duress, and seek-
ing to recover the same back, should have been stricken for mis-
joinder.

Appeal from Dubuque District Court.—HON. ROBERT BONSON,
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION to enjoin the enforcement of certain ordinances
of the city of Dubuque in relation to wharfage charges and
in relation to the use of the ice harbor by certain river craft.
There was a trial to the court. The plaintiff's petition was
dismissed, and he appeals.—*Reversed.*

Kendine & Roedell, for appellant.

George T. Lyon and *E. H. Willging*, for appellees.

EVANS, J.—For more than thirty years the plaintiff has
maintained a ferry across the Mississippi river at Dubuque,
and has also maintained a small boat livery. He has at
all times received and landed his passengers at this end upon
and from the levee or wharf of the ice harbor in the city of
Dubuque. He has also at all times housed his boats in such

harbor, and has occupied a house boat in connection therewith. In 1907 the city of Dubuque enacted a certain amendment to an ordinance, the enforcement of which seriously affects the business of the plaintiff. Such amending ordinance contains the following provision:

Sec. 9. That for the purpose of wharfage for all boats and water craft, the entire frontage of the city shall be deemed the levee (except such parts as have been heretofore excepted by the ordinances of the city). And all boats, shanty or house boats, boathouses or launch boat houses and water craft of any description landing at, anchoring or making fast within one hundred feet of such frontage, shall pay the city therefor the following amounts: All launches five (\$5.00) dollars per season for each fifteen feet of frontage of the levee used, payable in advance. All shanty boats, house boats or fish houses shall pay the sum of fifteen (\$15.00) dollars per year wharfage, payable in advance. All boat liveries shall pay the sum of twenty-five (\$25.00) dollars per year for each twenty-five feet of levee frontage used. All boating associations erecting a building or buildings on the wharf or levee of the city shall pay twenty-five (\$25.00) dollars per year as wharfage.

Sec. 10. No shanty, house boat or fish house shall be allowed to land or remain on any part of the levee or landing within any part of the ice harbor in the city of Dubuque.

Appellant's argument states the issues as follows:

By petition as amended, appellant avers that, under a coasting license issued by the United States, he used, in interstate commerce, a gasoline boat upon the Mississippi river in transporting passengers and property to and from a point near the northwesterly shore of the ice harbor and to and from Illinois; that, incident and necessary to such traffic, he has, in the water near the natural shore of said harbor, a boathouse, house boat, barge, float or dock, and other equipment; that the defendant city unlawfully pretends to impose a wharfage charge of \$1 per foot for space so occupied in said harbor; and that the defendant city and harbor master

threaten to remove said boats from said harbor. Abstract pages 2, 3, 24, 25, 28.

By answer, the defendants aver that they sought only to remove plaintiff's house boats from said harbor and, in justification therefor and the imposition of wharfage charges, pleaded the city ordinance, as amended, by which (1) the entire water front is declared a levee; (2) a wharfage charge is imposed against any and all boats and crafts landing at or anchoring within one hundred feet of such frontage; (3) no house boat is permitted to land or remain on any part of said levee or within any part of the ice harbor; and (4) the harbor master shall assign places for and remove water crafts of all descriptions. Abstract pages 4 to 13-26.

By reply, plaintiff avers that the shore and bed of said harbor was granted to the defendant city for use as an ice harbor in perpetuity and upon condition that the defendant city would establish and maintain a public levee upon the north shore thereof; that the defendant city duly authorized and empowered the United States government to dredge and otherwise improve and maintain said premises as and for a harbor in perpetuity; that the United States government did dredge and improve said premises (which constituted the bed and shores of a body of water leading to the Mississippi river), and has so maintained the same ever since; that the shores of said harbor and river front are unimproved and in their natural state; that the defendant city at no time ever constructed or maintained any wharves, docks, or landing places in said harbor or the shores thereof, or upon said river front, nor has the defendant city ever invested anything to either construct or maintain any such improvements; that the shores of said harbor and river front consist of nothing but the naked shore without any wharves or docks at which boats may land; that such landings are effected by means of a plank or gangway leading from such boat to said natural shore; that the defendant city has by no investment upon its part afforded any facilities whatever for boats in said waters or the shores thereof, nor has said city ever rendered any service or benefit to boats in that respect or any other; that such waters are navigable and free common public highways; that such ordinances, and the powers sought to be exercised thereunder are illegal and invalid in the respects, among others, as follows: (1) Be-

cause they impose wharfage charges against boats and water craft landing at or anchoring within one hundred feet of the entire unimproved water front and natural shores of said harbor in the city limits, without having provided or invested anything in any wharves, docks, or landing places, or rendering any service whatever to such boats, and without having established the levee required by the grant to said city or any other levee. (2) Because they absolutely forbid any house boat from entering or remaining in any part of said harbor, or landing or remaining on any part of the levee, without regard to the perils of the river which necessitate a place of shelter and refuge, and although the city has not the power to prohibit the use thereof. (3) Because they clothe the harbor master with arbitrary power to assign or remove boats to places wholly unsuitable and dangerous and without regard to the needs, convenience, or danger of the boat. (4) Because they obstruct and burden interstate commerce, although Congress alone has power to regulate same. (5) Because they are confiscatory and discriminatory. That the defendants attempt to remove his said boats solely because of plaintiff's refusal to pay the illegal wharfage so exacted by said ordinances. Abstract pages 13 to 24.

By supplemental petition, plaintiff avers that, upon the vacation of the temporary injunction herein, the defendant city, acting through its mayor, harbor master, police, sewer gang, and other agencies then present, threatened to at once forcibly remove his said house boat and boathouse then in said ice harbor unless plaintiff at once paid the wharfage charges of \$290 for the years 1909 and 1910, although said harbor was then frozen over with ice, and such removal would wholly destroy said property; and that, solely under such compulsion, he then paid defendants said wharfage of \$290, which defendants still retain. Abstract page 28.

In answer thereto, defendants aver that such payment was not made under compulsion, but under an arrangement whereby plaintiff's said house boats might remain in said harbor until removal thereof could be made in the spring, and upon condition that no action would be taken to recover back any part of said \$290 save by petition to the city council. Abstract pages 29-30.

In reply thereto, plaintiff avers that the evidence shows that the pretended arrangements referred to are void in that the same were made, if at all, under compulsion.

The facts in the case, as distinguished from legal conclusion, are not greatly in dispute. These facts, however, are quite voluminous in their details. It is important that many of these details be incorporated in this opinion. We cannot do better at this point than to avail ourselves of the labor of counsel and to incorporate herein the substance of the "statement of facts" appearing in each brief. From appellant's statement we quote as follows:

The pleadings and proof show that in 1880 the defendant city and its inhabitants desired the United States government to provide and maintain an ice or winter harbor at Dubuque, fronting upon and connecting with the Mississippi river, to promote navigation and afford a place of shelter and safety for boats and other water craft from the dangers of ice, storms, and other perils of the river. The then nearest harbor from Dubuque was at Quincy, Ill., to the south, and at St. Paul, Minn., to the north.

Subsequently in 1882, and in order to consummate the plan for such a harbor, certain Dubuque citizens by deed conveyed to the defendant city the bed and shores of what is known as the ice harbor, upon condition that the same be used in perpetuity as an ice harbor, and that a public levee at least one hundred feet wide be maintained on the north shore of said harbor.

Thereupon, in 1882, the defendant city by resolution authorized and empowered the United States government to improve and maintain said premises for an ice harbor in perpetuity.

Thereupon (1882-1885) the United States government at its own expense dredged said premises (which by nature constituted the bed and shores of a body of water leading to said river) so as to convert same into a navigable harbor leading into and connecting with the Mississippi river, and the United States government has since, at its own expense, so maintained the same.

The defendant city has not established any public levee upon the north shore of said harbor as required by the deed already referred to, but, in disregard of such deed, has granted to private parties for various private industries the whole of the north shore of said harbor.

The defendant city at no time ever provided, constructed, or maintained any wharves, docks, landing places, or other improvements of any kind in said harbor or the shores thereof, nor has the defendant city ever invested anything to either construct or maintain any such improvements; that the shores of said harbor are wholly unimproved and consist of nothing but the naked shore without any wharves or docks at which boats may land for either loading or unloading passengers and property; that landings are effected by means of a plank or gangway leading from the boat or barge to such natural and unimproved shore; that the defendant city has by no investment upon its part afforded any facilities whatever for boats in said harbor and the shores thereof, nor has the defendant city ever rendered any service or benefit to boats in that respect or any other.

That the easterly part of said harbor leads to and joins with the Mississippi river, a navigable waterway extending from St. Paul, Minn., southerly to New Orleans, La.; that during the winter boats of all kinds seek said harbor to escape destruction from the moving ice in the river, and such boats remain there at anchor until the opening of navigation; that the use of the northerly shore of said harbor has been granted by the defendant city to various parties free of charge, and is in use by said parties for boat building, sand company, and other purposes; that practically the whole of the space at and toward the southerly shore of said harbor is assigned to and utilized by the United States government's boats, and the remainder of said space at and toward the southerly shore is occupied by launchhouses and launches; that the larger part of the space at and toward the westerly shore is assigned to and occupied by launches and launchhouses, which are anchored in the water near said shore during the entire year; that the space occupied by plaintiff's boats and necessary equipment is in the water near the northwesterly part of the shore of said harbor; and that there is no other space in said harbor either available or at all suitable for his said boats and the necessary equipment therefor in order to handle the interstate traffic in which he is engaged or to remain during the close of navigation.

While the defendant city's charter (section 26) gives the city council the exclusive right to license and regulate

ferries, and to establish the rates of ferriage, between Dubuque and the opposite bank of the Mississippi river, yet the city has not seen fit to exercise such right.

The defendant city's charter (section 7, par. 17) gives the "city council the power to regulate the use of wharves and public landings, fix the rate of wharfage, and regulate the stationary anchorage and mooring of all boats within the city."

Thereunder the defendant city in 1907 adopted an ordinance giving the harbor master full power to assign places for all water crafts and compel the removal thereof, declaring the entire water front a levee, imposing wharfage charges, and prohibiting house boats, among others, from landing at or remaining on any part of said levee or within any part of said ice harbor.

That in August, 1910, defendant's harbor master, under instructions of the city council, gave plaintiff notice to remove his house boats from said ice harbor within twenty-four hours, otherwise he would remove same, solely because of failure to pay said wharfage charges, and based his right so to do upon the said ordinance.

That thereupon plaintiff commenced this action and obtained a temporary restraining order.

That although such ordinance as amended purports to designate the entire water front within the defendant city and along the Mississippi river as a levee for the purpose of wharfage, except such parts as have been heretofore excepted by the ordinances of the city, yet the defendant city has never constructed any wharves, docks, or landings upon such water front, nor has the defendant city ever maintained any such improvements thereat; that the defendant has no facilities whatever on said water front for the landing of boats; that said entire water front consists of nothing but the natural unimproved shore of the river other than one or two places occupied by others under ordinances granted by the defendant city and not available for the use of this plaintiff and the public; that the said natural shore on said river front is so shallow as to make it dangerous to life and property, if not impossible, to effect a landing on said river front by boats plying said river, and that said river front has never been used, and it is impracticable and dangerous to use the same, for any such purposes; that there are no facilities whatever provided nor any source of ben-

efit whatever rendered, by the defendant city for landing boats upon said river front so designated by said ordinance as a levee, and for which the defendant city thereunder erroneously and illegally attempts to collect and enforce the payment of wharfage charges as prescribed by the terms of said ordinance as amended.

That plaintiff (who is and since birth has been a citizen of the United States) is the owner and operates a fifty-foot boat, exclusive of rudder, propelled by gasoline engine, upon the waters of said harbor and river, duly enrolled and licensed by, and under the regulations of, the United States government, for the coasting trade in carrying and transporting people and property from Iowa to Illinois and from the latter state to the former, by operating said boat across the Mississippi river from the port or harbor in the city of Dubuque, Iowa, to the port of East Dubuque, Ill.; that likewise, by an arrangement with the Chicago, Burlington & Quincy Railway Company, an Illinois corporation and interstate common carrier, plaintiff's said boats carries and honors the tickets of citizens and passengers traveling from one state to another partly by rail and partly by boat; that, because of the failure of the defendant city to provide and maintain a public levee on the north shore of said harbor as required by the deed already referred to, it is necessary for the safety of said boat and passengers thereon, in the conduct of such interstate traffic, to have a reasonable water space in said harbor, and being the space now and long since occupied by him for that purpose, in order that said boat may turn and land without collision or danger, and to maintain suitable appliances and equipment for the purpose of landing said boat and the passengers so carried, because of the shallow water toward, and the wholly unimproved condition of, the shores in said harbor; that by reason of these things, and in order to carry on said interstate commerce and as part of the appliances toward that end, it is necessary for him to maintain a barge in the water and near the shore of said harbor in order that said boat may land thereat to receive and discharge said passengers, and also what are more properly termed two barges, upon each of which a substantial and permanent house is constructed in order to afford a place of rest and shelter for said passengers in case of storms or while waiting for the boat, and which houses upon said

barges are likewise necessary to keep small boats and repair supplies in the event of accident or casualty upon the water to person or property; that furthermore such houses upon said barges are necessary to provide living quarters for those in charge of and caring for said boats and property which require attention day and night, and which are commonly termed "house boats" or "boathouses"; that house boats are a type of boat which frequently ply the waters of the Mississippi river and touch at ports in various states along the river; that practically all boats plying said river are so equipped as to provide shelter and living quarters for those in charge and care of the boat, as well as others being carried thereon; that the plaintiff's said house boats, so called, are likewise utilized as a boat livery, consisting of seven skiffs, for use by the public, and also in reserve a thirty-foot full-decked launch, exclusive of rudder, propelled by a gasoline engine, for use in interstate commerce in the event of accident or casualty to the larger boat already referred to; that each and all of said boats in their use upon said river touch the shores of the states of Wisconsin and Illinois; that said house boats and barge float wholly upon the water and are anchored near and about ten feet from that part of the shore already stated, the arrangement being such that one barge touches and abuts the other extending into the harbor a distance of about forty feet, and to a point where the water is of sufficient depth to permit said boat to land; that from the barge nearest the shore there is a gangplank or gangway leading from the barge to the shore in order to enable passengers to either land or reach the boat; that from the point where said gangplank reaches said shore there is an unimproved steep embankment for a distance of about thirty-five feet leading to the said railway right of way and Second street in said city; that said entire equipment, as described and owned and maintained by plaintiff, is a necessary part of the appliances by which the interstate commerce, as described, may be carried on, and but for which the same could not be done with reasonable safety or otherwise.

That there are anchored and moored near the shores of said harbor thirty-nine launchhouses and twenty-nine launches, each of which occupies shore space, so called, of from fifteen to thirty feet, and which space is so occupied and reserved for the purpose during the entire year and

from year to year; that the defendants have never assigned for plaintiff's said boats any other space in said harbor than that hereinbefore described, and that there is no other space available and suitable for the use of plaintiff's said boats in said harbor and not already occupied as before stated, and his said boats and equipment in no wise hinder or obstruct navigation upon said waters; that the chief engineer of the United States government in charge of said harbor and waters, and the person in immediate charge of the maintenance thereof, acquiesced in the space so occupied by this plaintiff; that for many years last past the plaintiff has paid to the defendant city taxes upon said boats and equipment; that the only reason for defendant's action in threatening and attempting to remove plaintiff's said house boats, so called, and thus hinder and stop the running of his said boats and the instrumentalities so engaged in interstate commerce, is his failure to pay to the defendant city the unjust and illegal wharfage charge of \$145 yearly in pursuance of the defendant city's invalid ordinance already referred to; that, while defendants unjustly undertake to enforce such invalid ordinance against this plaintiff, yet they fail to do so against others likewise using space in said harbor and on said levee.

From appellee's statement we quote as follows:

John Keckevoet, the plaintiff, has been engaged in the boat business, in one form or another, in the ice harbor since 1880. This harbor is located wholly within the boundaries of the city of Dubuque, the city holding the title to its bed and shores; these having been deeded to it in 1882 by the then owners of the property.

Within the last few years this harbor became congested, due in part to the coming of the era of gasoline motor boats and extensive improvements of the river by the United States government and the fleet necessary to carry on such work, which fleet had its winter quarters in this harbor.

In 1907 the city council adopted an amendment to its 'ordinance appointing a harbor master and defining his duties and regulating public landings and wharfage'; section ten of which provides that 'no shanty, house boat or fish house shall be allowed to land or remain on any part of the levee or landing within any part of the ice harbor in

the city of Dubuque. . . .’ Shortly after the adoption of the amendment the harbor master removed eleven house boats from the harbor. Plaintiff at that time conducted a boat livery, and also operated a gasoline ferry between Dubuque and East Dubuque. He was then and is now located along the northwest shore of the harbor, the most convenient and accessible location in the harbor, and occupies one hundred and forty-five feet along such shore with floats, barges, and house boats. He uses two gasoline launches in his ferry business, the largest of which is fifty feet long. He contends that all the floats, docks, barges, and house boats are an indispensable necessity to the operation of this ferry. On the East Dubuque side he has one barge about fourteen by thirty-two feet, which seems to answer the purposes.

On August 10, 1910, the city council directed the harbor master and city attorney to take steps at once to remove the house boats of the plaintiff from any part of the harbor.

On August 15, 1910, the harbor master served upon the plaintiff a notice to remove his house boats from that part of the levee or landing within the ice harbor . . . within twenty-four hours, and on the same day plaintiff commenced this action and secured an order granting a temporary injunction.

On August 17, 1910, this defendant filed its answer and also a motion to dissolve the temporary injunction. November 15, 1910, the court sustained the motion and dissolved the temporary injunction.

We omit from the foregoing some contentions of fact which have no support in the evidence.

I. The appellant challenges the validity of the ordinance on the grounds (1) that the city had no power to collect wharfage fees because it had incurred no expense in the building or maintenance of a wharf, and (2) that the ordinance was an interference with interstate commerce, and (3) that it was unreasonable and confiscatory in the rates charged, and (4) that it was discriminatory.

The first contention cannot be sustained. The right of

a city to impose wharfage fees within its jurisdiction does not arise solely out of the expense which it incurs in the maintenance of the wharf. Ordinarily it is true that the establishment and maintenance of a wharf implies more or less expense. The extent of such expense is necessarily dependent to some degree upon the natural conditions of the bank. In the case before us the evidence does show that some improvement has been made upon natural conditions. Artificial steps are maintained and some riprapping upon the banks. The wharf has been specified and established as such. The police protection of the city and its police power extend to it. The city charter of the defendant especially confers power upon it to regulate the use of wharves and fix the rate of wharfage.

Neither is the exercise of such power an interference with interstate commerce. The authorities are united in holding that ordinances providing for reasonable wharfage fees are a valid exercise of police power. *Cannon v. New Orleans*, 20 Wall. 577 (22 L. Ed. 417); *Packet Co. v. Keokuk*, 95 U. S. 88 (24 L. Ed. 377); *Muscatine v. Packet Co.*, 45 Iowa, 190; *Dubuque v. Stout*, 32 Iowa, 80. But the wharfage fees exacted must be reasonable. The name cannot be used as a guise for a "tonnage tax" or a "port warden's fee," or for other ulterior purposes. *Cannon v. New Orleans, supra*; *Steamship v. Port Wardens*, 6 Wall. 31 (18 L. Ed. 749). These holdings are in harmony with our own to the effect that ordinances of a city must be fair and reasonable. *State Center v. Barenstein*, 66 Iowa, 249.

The serious question in the case before us is whether the ordinance under consideration fixing the wharfage fees was fair and reasonable, or whether it was confiscatory as contended by appellant. That at least several members of the city council regarded the rate as exorbitant is admitted by them as witnesses. They had only intended to collect from the appellant thereunder \$50 instead of \$145. The harbor

1. MUNICIPAL
CORPORATIONS:
wharves: fees.

2. SAME: municipal power:
unreasonable fees: evidence.

committee had agreed upon that rate, although no formal action had been taken by the city council. The city attorney testified as a witness for the defendant. On cross-examination he testified: "I know I considered \$1 per foot pretty strong, and had always considered it pretty strong, and had recommended to the city council that we accept less before and would do so again." As already indicated, the expense incurred by the city in the maintenance of the wharf is very slight indeed. The business of the plaintiff is manifestly for the public convenience. It is conducted at very modest rates, and he realizes, from the business as a whole, a very modest reward for his labor. His regular rate of ferrying across the river is five cents per passenger, with a reduced rate of 2½ cents for working people. He maintains a livery of seven boats, which he rents to the public at \$1 per day or fifteen cents an hour. The proof shows his earnings over and above his expense to be very modest indeed. These facts are by no means controlling upon the city council, but they throw some light upon the other testimony in the case bearing upon the question of reasonableness of rate. The ordinance is so worded that this rate applies to only a very few persons who use the river frontage. To this feature we will refer later. The ordinance rate was not at first exacted from the plaintiff. Later, however, the harbor master made demand upon him for the full rate for the years 1909 and 1910. Other craft is so classified in the ordinance as to get the benefit of a much smaller rate of wharfage fees. Practically all the north shore of this harbor is appropriated by private enterprises from which no fees whatever are exacted. The same may be said of other portions of the shore. We think it must be said that the ordinance is unreasonable at this point in the rate of wharfage charged. It is also clear from the record that great discrimination has been practiced, in fact, under this ordinance. Whether this has resulted from the particular form and classification of the ordinance, or whether its actual enforcement has been a matter of favor and partiality, is not so clear.

It is strongly urged by appellees that the question of wharfage fees is not in the case. It is said that the city has

only enforced against the appellant that provision of the ordinance which prohibits the remaining of house boats within the harbor.

2. SAME: enforcement of power: issues.

A notice was served upon the appellant to remove his house boats. Upon his failure to do so the city officers proceeded to remove the same. It is said that this action had nothing to do with the collection of the wharfage fees. An examination of the evidence satisfies us that this position is not well taken. It was the failure of the appellant to pay his wharfage fees that resulted in the demand for the removal of the house boats. Members of the city council so admit in their testimony. The payment of the wharfage fees under protest stopped the threatened removal for the time being. The plaintiff's petition tendered an issue at this point. The question is therefore fairly before us in the case. It is our conclusion that the ordinance is void for unreasonableness in the respect indicated.

II. We turn now to that part of the amended ordinance known as section ten and which is quoted above. This section

prohibits any "house boat . . . to land or remain on any part of the river or landing within any part of the ice harbor of the city of Dubuque." This is prohibition and not regulation. We

4. SAME: use of harbor: discrimination.

find nothing in the charter of the city nor in the statutes which empower the city to enact such a sweeping prohibition. The testimony shows a house boat to be a very useful and ordinary adjunct of river craft. The very purpose of the ice harbor is to furnish winter refuge to the craft that plies the river. The city has full power to enact ordinances providing reasonable regulations for the use of such harbor. We do not think, however, that it can select a particular craft and prohibit the use of the harbor thereto unless there be some reason of public policy or protection which does not appear in this record. It is urged in argument by appellee that the

harbor is becoming congested, and that some prohibitory provision is necessary. The record is not favorable to this contention by appellee. It has voluntarily devoted, if not diverted, a large part of the harbor and its shores to the use of private enterprises which were not contemplated in the original dedication of the harbor. These enterprises are doubtless advantageous to the city in the sense that they employ a large amount of labor and capital, and tend thus to increase the trade of the city; but the presence of these private enterprises does not change the duty of the city with respect to this harbor and the use to which it was originally dedicated. This provision of the ordinance is void as being in excess of the power of the city council.

III. The plaintiff paid to the city \$290, under protest, pending the controversy between him and the harbor master

and the city council as to the threatened removal of his house boat out of the harbor. It is the contention of the appellant that he paid the money under duress. The payment occurred long after the beginning of this suit. Thereafter the plaintiff filed a supplemental petition pleading the payment of such amount under duress and asking to recover it back. He now asks us to determine this issue and to award him judgment for the recovery of the amount so paid.

Upon the filing of his supplemental petition, the defendant moved to strike it for misjoinder. Such motion being overruled, the defendant demurred on the same ground. This demurrer was also overruled. Thereupon the defendant answered, and the case proceeded to trial. There was manifest error on the part of the learned trial court as against the defendant city in overruling its objection to the misjoinder of causes of action. This error was cured, so far as the city was concerned, by the subsequent result. This branch of the plaintiff's case was purely an action at law. Either party was entitled to demand a jury. There was no warrant under the statute for joining it with the equitable action. The defendant

5. ACTIONS : mis-
joinder of
causes.

was entitled to the separation when it asked it in the trial court. If we were now to proceed to a trial of this branch of the case upon its merits, we would be repeating the error of the trial court without giving the city any right of exception or appeal; it being in no position to appeal from the ruling of the district court when final judgment went in its favor there. We will therefore give no consideration to the merits of this branch of the case. We will sustain the dismissal thereof by the district court as on the ground of misjoinder and abatement, reserving the merits of the case, whatever they be, from the adjudication. This will leave the merits of the case undetermined and subject to a further action between the parties.

For the reasons indicated above, the decree of the trial court must be, and it is, *Reversed*.

STATE OF IOWA V. THOMAS YOUNG, Appellant.

Criminal law: MURDER: INSTRUCTION. Merely consenting to the commission of an offense is not under all circumstances punishable as a crime; but where defendant admitted that he struck deceased at the time and place in question, the instruction that if defendant, alone, or with his co-defendant, or either of them, the other being present, aiding, abetting or consenting thereto, did kill the deceased, defendant would be guilty, was not erroneous as advising the jury that defendant might be convicted if standing idly by and took no part in the affray.

Same: WITHDRAWAL FROM AN AFFRAY: INSTRUCTION. Where one in good faith withdraws from a combat he ceases to be a wrongdoer, if his adversary has reasonable ground to believe that he has so withdrawn, even though such withdrawal is not clearly evinced. But where it appeared that the defendant was an aggressor at all times during the affray, and never at anytime indicated his withdrawal, or that he intended to withdraw, he was not prejudiced by an instruction to the effect that his withdrawal from the combat must be clearly signified.

Instructions: REFUSAL OF REQUESTS. Refusal of a requested instruction fully covered by those given by the court is not reversible error.

Criminal law: VERDICT: REVERSAL. Where the jury and court who saw and heard all the witnesses believed those for the state, the verdict will not be set aside because of the character of the state's witnesses.

Appeal from Decatur District Court.—HON. T. L. MAXWELL,
Judge.

TUESDAY, DECEMBER 10, 1912.

DEFENDANT was convicted of manslaughter, and appeals.
—*Affirmed.*

C. W. Hoffman and Marion Woodard, for appellant.

Geo. Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

SHERWIN, J.—The defendant, Thomas Young, was jointly indicted with Clarence Teale and others for the murder of Mrs. Bertha Zornes on the 7th day of December, 1910. A separate trial was had at his request, and he was convicted of manslaughter. Clarence Teale had already been tried on the same indictment and found guilty, and on his appeal the judgment against him was affirmed. The case is reported in 154 Iowa, 677, and from the opinion in that case we quote the general statement as to the facts immediately preceding the death of Mrs. Zornes:

Mrs. Zornes, with her husband, Levi Zornes, and their children lived on a farm adjoining the farm upon which this defendant lived, and Levi Zornes rented of this defendant two or three acres of his land. In the evening of the 7th of December, the deceased, with her husband and three sons, Henry, eighteen years of age, Willie, thirteen years

old, and Elzie, twelve years old, were at the family home on the farm. A daughter, eleven years of age, was at the time away from home. The Zornes had for supper that evening Thomas and Henry Phillips, their nephews, and both grown men, and Roy Young, a man twenty-nine years old, who is a brother of Thomas and Ed Young, who, with one Hugh Teale, were jointly indicted with this defendant, Clarence Teale, for this murder. The Zornes family and their supper guests remained at the house during the evening, and about 9 o'clock, or a little thereafter, this defendant, Clarence Teale, his brother, Hugh Teale, a man twenty-two years old, and Thomas and Ed Young, adults, called at the Zornes home and were admitted to the house, and they, with the other guests and the family, except Mrs. Zornes, were in the same room; it being a southeast room of the house, with an outside door opening therefrom on the east, and a door in the southwest corner thereof opening into the southwest room of the house, which room had an outside door opening to the south. A room directly north of the living room, where these people were, was occupied as a bedroom, and when this defendant and his friends arrived at the house Mrs. Zornes was lying on one of the beds therein; but the door between the two rooms was open. The door between the two south rooms was in the southwest corner of the east room, and it was hung so that it swung to the east and south. At the time in question a shotgun belonging to one of the Zornes boys stood behind this door, which was then open. Shortly after the Teales and Thomas and Ed Young entered the house, a controversy arose between this defendant and Mrs. Zornes as to who was the author of a report current in the neighborhood that a young woman had been cooking for the defendant; he accusing Mrs. Zornes of being its author, and she denying it. Intemperate language was applied to each other, which finally resulted in a request from both Mr. and Mrs. Zornes that the defendant and his party leave the house. Up to this point there is no substantial difference between the witnesses as to what took place in the house, but beyond this there is a marked conflict in the testimony. The witnesses for the state say that when Mr. Zornes requested them to leave, Thomas Young (the defendant in this case) said that Zornes could not put him out, and immediately struck Zornes on the head with a heavy bicycle pump and

knocked him down; that Young knocked Zornes down in the same way a second time, and then threw the pump at Mrs. Zornes, striking her in the face and knocking her down. On the other hand, defendant's witnesses claim that Mrs. Zornes told her husband to get the shotgun and shoot the offending persons, and that while he was attempting to do so Thomas Young knocked Zornes down with the bicycle pump; that Mrs. Zornes then assumed a threatening attitude toward Thomas Young; and that he then knocked her down with the pump. But the question as to who was the physical aggressor in the house is not of controlling importance in this case. For present purposes it is enough to say that after being knocked down twice Mr. Zornes, together with Henry Zornes and the Phillips men, were driven from the house through the southwest room, and that the conflict was renewed on the outside with Zornes and his son Henry. Mrs. Zornes and the two younger boys remained in the house until the others had gone outside; whereupon she, with these two boys, left the house by the east door, and started in a northwesterly direction therefrom.

The record on this present appeal further shows that the defendant, Thomas Young, followed the Zornes men out of the house, and was actually engaged in a conflict with them on the outside. According to his own testimony, while he was defending himself against the attacks of some of the men, he struck Mrs. Zornes on the head with a club. He claims, however, that Mrs. Zornes assaulted him in the dark outside of the house, and that when he struck her he did not know who it was that he struck. The evidence on the part of the state tends to show that Mrs. Zornes was, in fact, struck and killed by Clarence Teale, and that this defendant, Thomas Young, aided and abetted said Teale.

In the thirteenth and eighteenth instructions the court said: "If you find . . . that . . . the defendant, Tom Young, alone, or that the defendant, Tom
 1. CRIMINAL
 LAW: murder:
 instruction. Young, and his codefendant, Clarence Teale, or either of them, the other present aiding, abetting, or consenting thereto, did unlawfully kill Bertha

Zornes"—defendant would be guilty. Complaint is made of the use in these instructions of the words "consenting thereto," on the ground that the jury was told, in effect, that defendant might be convicted, if he was standing idly by and took no part in the trouble. Merely consenting to the commission of a crime would not, under all circumstances, be punishable as a crime, no matter how great the moral turpitude involved. But there was no error in the instruction here, because the defendant admitted that he was the one who struck the deceased at the time and place in question.

The twenty-third instruction was as follows: "If, however, you find from the evidence that the defendant, Tom

2. SAME: withdrawal from an affray; instruction. Young, went to the home of Bertha Zornes on the night of December 7, 1910, with a view to provoke a quarrel or bring on an affray or difficulty with her, or that after going to the home of the said Bertha Zornes at said time the defendant, Tom Young, without provocation or legal excuse, provoked or brought on an affray by assaulting the said Bertha Zornes or members of her family, and you further find that thereafter the defendant, Tom Young, in good faith withdrew from such affray or difficulty, and clearly signified to the said Bertha Zornes that he had so withdrawn and abandoned further combat, then thereafter his legal right of self-defense would be restored to him, and he might exercise the same under the rules given elsewhere in these instructions." Appellant says that he was not required to "clearly signify" to Bertha Zornes that he had, in good faith, withdrawn from the conflict, and that the instruction was therefore erroneous. In *State v. Dillon*, 74 Iowa, 653, this court disapproved a similar instruction and held that, where a defendant actually and in good faith withdrew from the combat, he ceases to be a wrongdoer, if his adversary has reasonable ground for believing that he has so withdrawn, even though such withdrawal is not clearly evinced. But this defendant was not prejudiced by the instruction complained of, because a care-

ful examination of the record before us shows that this defendant, at all times during this difficulty, was an aggressor, and, so far as the record shows, never at any time indicated even to Bertha Zornes that he had done so, or that he intended to withdraw, from the combat. There is clearly no merit in appellant's contention that the instruction under consideration assumed that defendant, Thomas Young, made the assault in the house, and was not acting in self-defense.

Complaint is made because the court refused to give an offered instruction touching the weight to be given the evidence of certain witnesses whom the defendant had attempted to impeach. There was no error in the refusal to give this instruction, for the reason that the court with sufficient fullness covered the question in the instructions given.

Appellant's contention that the evidence is insufficient to warrant this conviction cannot be sustained. There is much evidence supporting the state's case, and, unless we wholly disregard the testimony of many witnesses, the conviction must be upheld. The jury and the trial court saw and heard all of the witnesses, and we cannot, and should not, say in this case that the verdict is wrong because of the character of the state's witnesses. The judgment is therefore, *Affirmed*.

STATE OF IOWA, v. R. L. DUNCAN, Appellant.

Criminal law: BURGLARY: EVIDENCE OF ACCOMPLICE: CORROBORATION.

- 1 The corroboration of the testimony of an accomplice required by the statute to sustain conviction must be by testimony independent of that which comes from the accomplice, and must tend to connect the accused with the commission of the offense. On this prosecution for burglary the evidence is held insufficient to corroborate the accomplice and to connect defendant with the commission of the crime.

Same. The mere finding of a revolver taken from the burglarized premises tended to show nothing more than that the premises had been broken into, and was insufficient for the purpose of corroborating the accomplice or connecting defendant with the commission of the crime.

Appeal from Fremont District Court.—HON. E. B. WOODRUFF, Judge.

TUESDAY, DECEMBER 10, 1912.

DEFENDANT was indicted, tried, and convicted of the crime of breaking and entering in the daytime the passenger depot of the Chicago, Burlington & Quincy Railroad Company at the town of Hamburg, and appeals.—*Reversed.*

Wm. Bammer and Wm. Eaton, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

DEEMER, J.—On the 5th day of March, 1911, the ticket office located in the depot of the Chicago, Burlington & Quincy Railroad Company at Hamburg was broken into while the ticket agent was at dinner, and the money drawer was broken open and \$98.25 in money taken therefrom. One R. E. Fowler, who was in the employ of the railway company as a section hand, was arrested for the offense and confesses to have had a part therein and at the trial of defendant, was a witness for the state. At that trial he testified that he and defendant conspired to commit the offense, and selected Sunday as the day for the reason that there would then be more money in the office because the ticket agent did not make any bank deposits from Friday until the following Monday. Defendant lived about one hundred feet just south of the depot, and his wife conducted a restaurant in the property. Fowler testified that on the day of the breaking he went to defendant's

around the passenger trains after that time. Q. Did you see him around the passenger trains after the 8 o'clock train in the morning, after Mr. Seaman got off? A. No, sir. Q. Do you remember seeing him some time right after noon on the porch of his restaurant there? A. Yes, sir. Q. Do you remember seeing Ed Fowler in that vicinity? A. Yes, sir. Q. What, if anything, did you observe the defendant do as to motioning or calling Mr. Fowler and Mr. Fowler going over there? A. Fowler started down the track and was walking along and I saw Bob motion for him to come back, and he went in the restaurant with Bob. Q. How long did he remain there? A. Well, I should say about fifteen or twenty minutes. Q. Now, did you see Mr. Fowler and the defendant after you came back to the depot—I mean after you got back to the depot after dinner on Sunday? A. I saw them together. I seen Fowler go back over to Duncan's about 1:15, just shortly after 1. I didn't see the two together that day.

The witness Seaman testified: "I am special agent for the Burlington road. My duties are to investigate claims and look after parties who commit thefts against the company. I have known the defendant about a year and a half. I learned of this robbery on Sunday and came from Red Oak to Hamburg about 8 o'clock on Monday morning. When I got off the train, Duncan was standing by baggageroom. He went from there over to Mrs. Duncan's boarding house. I went into the ticket office. I observed Duncan. I went into the depot at the east door. I don't know whether he saw me or not. I saw him standing on the porch over there and watching every move I was making. I went to St. Joe that evening on the 6 o'clock train."

This is all the corroborating testimony, and we think it insufficient to connect defendant with the crime. The witnesses all admit that defendant had met the trains at the depot frequently for many years, and there is nothing in the fact that he met the Monday morning trains, which under this record should be considered a circumstance against him. The only other testimony against him is that he watched the de-

tective while he was investigating the matter in the ticket office, and that during the afternoon of the day the detective was there defendant motioned to Fowler to come over to his (defendant's) residence, which he (Fowler) did, remaining there for some fifteen minutes. The testimony shows that defendant had heard of the breaking of the depot just after it was committed, and, if he did, it was quite natural for him to watch the movements of the detective. That he did watch him is not at all inconsistent with innocence. That he should have called Fowler to his residence in plain daylight, while the detective was in town, is not in any manner indicative of guilt. Arnold also testified that when he got back to his office on Sunday he saw Fowler go over to Duncan's place at the hour of about 1:15 p. m. Remembering that it was Sunday, and that a restaurant or lunch house was being conducted at that residence, there is nothing indicative of guilt in that transaction. There is nothing in this independent testimony which in our opinion tends to connect defendant with the commission of the offense. Defendant or his wife or both were conducting a restaurant or lunchroom at their residence which is close to the depot, and defendant frequently met incoming trains. Fowler was a section hand, and his business frequently called him near the restaurant, and he was acquainted with Duncan. Their meeting then, either on the day of or after the commission of the crime, is not suggestive of crime. If Duncan knew the railway detectives as the state claims he did, there was nothing unusual in his watching their movements if he was advised, as the record shows he was, that the ticket office had been broken into. He frequently met trains as they came before the day when the detective appeared upon the scene. This being the entire record, we think there should have been a verdict for the defendant, and that the trial court was in error in not granting a new trial. See, as sustaining our conclusions, *State v. Willis*, 9 Iowa, 582; *State v. Mikesell*, 70 Iowa, 176; *State v. Cowell*, 149 Iowa, 460; *State v. Jones*, 115 Iowa, 113.

II. In any event, some of the instructions given by the trial court were erroneous. Instruction 15 reads as follows:

It is a question of fact for you to determine from all the evidence before you whether the witness Fowler has been corroborated as above explained, and in determining this question you have a right to consider the situation of the defendant and the witness Fowler. That is, whether they were together, or where they were, at the time the witness Fowler broke and entered said building; what interest if any, the defendant took in watching for the so-called detectives of the railroad company; whether he received any portion of the stolen property at the time or very soon thereafter; and what, if anything, he did with any part of it; whether he received the revolver which he claimed was stolen at the time of the breaking and entering; and, if so, what he did with it. And from these and all other facts and circumstances in evidence you must say whether or not witness Fowler has been corroborated as the law requires.

Assuming for the purpose of this discussion that there was some corroborating testimony, it is very clear to our minds that the circumstance of the finding of the revolver in

the outhouse in no manner tends to connect
2. SAME. defendant with the commission of the offense.

Aside from the testimony of Fowler, there is nothing whatever to show that defendant ever saw, had possession of, or had anything to do with putting it in the vault of the outhouse. This finding of the revolver did nothing more than show that some one had broken into the ticket office, and this the statute expressly says shall not be sufficient. See *State v. Cowell*, 149 Iowa, 460; *State v. Jones*, 115 Iowa, 113.

For the errors pointed out, the judgment must be, and it is, *Reversed*.

STATE OF IOWA, Appellee, v. JOHN J. O'BRIEN and HARRY W.
SUMMERS, Appellants.

Criminal law: BURGLARY: BREAKING: CIRCUMSTANTIAL EVIDENCE.

1 Where the only reasonable inference from the proven circumstances is that there was an actual breaking, a conviction for burglary will not be set aside because of the absence of direct evidence on the subject.

Same: NOTICE OF ADDITIONAL EVIDENCE: RETURN OF SERVICE: REVIEW.

2 The return of service of notice of the taking of additional evidence in a criminal case, stating that the sheriff served the same by "reading said notice to each of said defendants and delivering them a true copy thereof" was a sufficient return to show complete service on each defendant, although it would have been more exact if stating that a copy was delivered to each defendant; and where there was no attempt to bring the claimed defective notice fairly to the attention of the trial court it will not be considered on appeal.

Same: WITNESSES: INDICTMENT: VARIANCE IN NAME. The fact that

3 the surname of a witness, who was before the grand jury, was not properly spelled on the back of the indictment to which his testimony was attached will not justify the rejection of his evidence, where his identity is clearly ascertainable from his evidence and his name as actually written on the indictment.

Appeal from Page District Court.—HON. O. D. WHEELER,
Judge.

TUESDAY, DECEMBER 10, 1912.

DEFENDANTS were indicted for burglary, under the provisions of section 4791 of the Code. Upon a plea of "not guilty," there was a trial to a jury. A verdict of "guilty" was rendered, and judgment entered thereon. The defendants appeal.—*Affirmed.*

Earl R. Ferguson and C. R. Barnes, for appellants.

Geo. Cosson, Attorney General, John Fletcher, Assistant Attorney General, and L. H. Mattox, County Attorney, for the State.

EVANS, J.—It is contended that the evidence was not sufficient to sustain the verdict. There was no testimony offered on the part of the defendants. On behalf of

1. CRIMINAL LAW:
burglary:
breaking: cir-
cumstantial
evidence.

the state it was shown that the defendants were discovered in the store of the Essex Mercantile Company at about two o'clock on Sunday morning, September 10, 1911. A few minutes later they left the store, and were arrested. At the time of their arrest they were carrying away a sackful of merchandise, which had been taken from such store. They were strangers in the town. The specific manner in which, and the place at which, they entered the store was not disclosed at the trial. The proprietor and employees closed the store shortly after ten o'clock the night before. At that time they fastened all doors and windows and other openings. When the defendants were discovered in the building by the night watchman, he found no evidences of the place or manner of their entrance. It is urged here that there was therefore no evidence of a "breaking," within the meaning of the law. It would be more correct to say that the evidence was circumstantial on that question. The jury drew the inference that they must have entered the building in some manner, and that they could not have entered it without "breaking," within the meaning of the law, if all openings were closed the night before. This was the only possible inference, under the evidence, consistent with common sense. We readily reach the conclusion, therefore, that the evidence was not only sufficient to sustain the verdict at this point, but that it was very persuasive in its details. *State v. Sorenson*, 157 Iowa,—.

II. Three days before the trial the state served upon

the defendant written notice of an additional witness. The sheriff made the following return of service thereon: "State of Iowa, Page County—ss.: I, George H. Whitmore, hereby certify that I am the sheriff of Page county, Iowa; that I served the above notice upon the defendants John J. O'Brien and Harry Summers on the 23d day of October, 1911, by reading said notice to each of said defendants and delivering them a true copy thereof. All of which was done in Page county, Iowa. George H. Whitmore, Sheriff." When such additional witness was called to the witness stand, the following occurred:

2. SAME: notice of additional evidence: return of service: review.

Mr. Barnes: Before this witness testifies, I want to object to him as incompetent, for the reason that no proper notice was ever given of his testimony before the court, and no proper service was ever made of the notice upon the defendants. The notice is not properly served upon the defendants at all. (The notice is here produced and examined by the court.) The Court: The return is here, Mr. Barnes, that it was served by reading it to each of the said defendants and delivering them a true copy thereof. If there is anything defective, I do not see it, Mr. Barnes. Mr. Barnes: We make the objection for the sake of the record. I do not feel very sure. I make this objection, but I thought there was a possibility of a defect in there which I thought I saw. I am stating my record for that purpose. That is the only reason I am making the objection at this time. The Court: The record already shows here that the defendants, for the purpose of going to trial on this date, waived the fact that notice was served less than three days prior to the date of this trial. Mr. Barnes: No; there is no objection to that fact, your honor. The Court: Then the objection will be overruled.

The particular point which is now urged for reversal is that, although the return of the sheriff disclosed a reading of the notice to each of the defendants, it did not show delivery of a copy to each. The contention is that the return

showed a delivery of only one copy for both defendants. The most that can be said is that the return was possibly ambiguous. It would have been more exact, in a grammatical sense, if it had stated, not only that the notice was read to each defendant, but that a copy was delivered "to each of them." But grammatical exactness is not always available in the sheriff's office; nor is it legally necessary, though always desirable. We think the return, above quoted, could fairly be construed as showing a complete service upon each defendant.

There is a further reason why the point is not available to the defendants. It was not frankly made before the trial court. A perusal of the record, above quoted, shows that there was no attempt to bring to the attention of the court the point now urged. A formal objection was made "for the sake of the record." The trial court stated: "If there is anything defective, I do not see it." Counsel for defendants appear to have been too deferential to the court to point out the defect which they now urge vigorously upon us. If the attention of the trial court had been directed to the defect claimed, it might have been cured, either by an amended return, or by evidence of the facts relating to the service. No claim is made that the service was in fact defective as distinguished from the return. The art of concealing a grievance from the trial court, in order to save it on the record for this court, will, perhaps, never be wholly lost to the profession. But the assistance which it can command in this court when it gets here will not be conspicuous for zeal. In the case before us the attention of the trial court appears to have been diverted to some extent from the real defect now complained of by the fact that the notice had not been served four days before the trial and this point had been waived by the defendant before the trial commenced. This fact is apparent from the remarks of the court appearing of record. We think the defendants are in no position to complain of the ruling involved at this point.

III. One of the witnesses for the state was L. Wiede-

man. He had been examined before the grand jury, and the minutes of his testimony were attached to the indictment. Signatures of the witnesses had been waived. But the name of the witness appeared on the back of the indictment as L. Wiedman. Proper objection was made to his competency as a witness because his name did not appear upon the back of the indictment. We think the variance was not sufficient to justify the rejection of the witness.

3. SAME: witnesses: indictment: variance in name. John Zachison also was a witness. The minutes of his testimony before the grand jury were attached to the indictment. His name appeared upon the back of the indictment as John Zacherson. The same objection was made to this witness. No question is raised as to the identity of either of these witnesses as being the persons who testified before the grand jury, and the minutes of whose evidence were attached to the indictment. The question presented is solely one of innocent mistake in spelling. We think the identity of the witnesses was readily ascertainable from the minutes of their evidence and from the names as actually written upon the back of the indictment. We have never held such a variance as here shown to be fatal. We do not think that such a holding is required by a fair construction of the statute, nor in the interest of a fair trial to the defendants. If perfect spelling were essential to legal procedure and pleading, the prospect for the maintenance of law and order by criminal prosecutions would become quite gloomy. In the record before us the name of the first witness appears as "Wiedeman," "Wiedman," "Weideman," and "Weidman." That of the second witness appears as "Zachison," "Zacherson," "Zachrison," and "Zachesson."

No other points are argued. We reach the conclusion that the defendants had a fair trial, and that there is no reasonable doubt of their guilt.

The judgment of the trial court is therefore—*Affirmed.*

STATE OF IOWA v. HARRY HECTOR, Appellant.

Criminal law: SEDUCTION: EVIDENCE: CROSS-EXAMINATION. Where a
1 prosecutrix for seduction testified on direct examination that she had kept company with defendant and had gone with one certain other party, but could think of no others, her cross-examination as to her going with other named young men was proper.

Same: IMPEACHING EVIDENCE: PRIVILEGED COMMUNICATIONS. Where a
2 prosecutrix for seduction, in explanation of the reason why she had not stated to the grand jury certain matters testified to on the trial, said that she was not interrogated with respect to such matters, the defendant should have been permitted to show by the county attorney, who was before the grand jury in that capacity, questioned the witness and acted as clerk in taking down the minutes of her evidence, that she was in fact questioned regarding such matters and testified differently than she had upon the trial; as the evidence of the county attorney was not within the privilege of the statute.

Same: NEW TRIAL: MISCONDUCT IN ARGUMENT. Even an indirect ref-
3 erence by counsel for the state that defendant, in a criminal case, did not take the stand in his own behalf, is a violation of the statute and should not be made.

Same: INSTRUCTION: SEDUCTIVE ARTS. On this prosecution for seduc-
4 tion the instruction with reference to the extent of the seductive arts and deception practiced upon prosecutrix, which will warrant conviction, was supported by the facts and was a proper statement of the law.

*Appeal from Pottawattamie District Court.—HON. E. B.
WOODRUFF, Judge.*

TUESDAY, DECEMBER 10, 1912.

DEFENDANT was indicted, tried, and convicted of the crime of seduction and appeals.—*Reversed.*

A. L. Preston and John P. Organ, for appellant.

George Cosson, Attorney General and John Fletcher, Assistant Attorney General, for the State.

DEEMER, J.—At the time the crime is said to have been committed, Minnie Peterson, the prosecutrix, was about sixteen and one-half years of age, and defendant was just past eighteen. Each lived at the home of his parents in the town of Walnut in Pottawattamie county, Iowa, and within a short distance of each other. Prosecutrix came into town with her parents in the year 1905, and during the fall of that year she first met the defendant. The seduction is said to have occurred in June of the year 1906. At that time defendant was attending the public schools; but prosecutrix had ceased going to school and was living at home. She met the defendant, so she says, about three times in the year 1905 and the same number of times during the year 1906 before the seduction was actually accomplished. She says that this occurred on the 8th or 9th day of June, 1906, and was the result of defendant's making love to her, hugging and kissing her, and stating that it was all right to have sexual intercourse, that other girls did, that no harm would come of it, and that if there did he would marry her. She also testified that as the result of the intercourse a child was born to her on February 26, 1907.

I. On direct examination prosecutrix gave the following testimony: "Q. He was your beau? (Objected to as incompetent and asking for the conclusion of the witness, Over-

ruled. Defendant excepts.) A. Yes, sir. Q. And you never had any other young man about you or with you, did you, before or up

to that time A. Yes, sir; I had been with Mr. Walters before, I remember. Q. And any others A. No, sir; not that I can think of. Q. Was there any other young man with you so frequently as this young man, the defendant here? (Objected

1. CRIMINAL LAW:
seduction: evi-
dence: cross-
examination.

to. Not answered.) Q. What I want to know is whether or not this young man, the defendant here, was your—was the fellow that was with you, as you folks tell it, whether he was your fellow? (Objected to as incompetent, leading, suggestive, and asking for an opinion and conclusion of the witness. Overruled. Defendant excepts.) Yes, sir; I loved him better than anybody else.” On cross-examination the witness was asked as to her going with other young men, naming them, before June of the year 1906; but objections to the questions because not cross-examination and immaterial were sustained. In this there was manifest error. The matter was clearly cross-examination and the testimony material

We extract the following from the record in order that another proposition relied upon by appellant may be understood:

Exhibit 1 is the statement I signed about this matter in the grand jury room, when it was under investigation. At that time, I didn't say that the defendant said to me that he would marry me in the event that I became pregnant, or that he would take care of me in the event that I got into trouble in that way, or anything of that kind, because they didn't ask me. I think it was Mr. Hess who was asking the questions in the grand jury room. He didn't ask me there if Harry Hector had at any time promised to marry me or anything of that kind. And I didn't reply, 'No, it was never mentioned.' I don't think he ever asked me that. Before I went to the grand jury room, I saw Mr. Hess at Walnut and talked with him quite a while. Q. Didn't he also at that time ask you if Harry Hector hadn't promised to marry you during some of these times? Or something of that kind? Didn't he ask that repeatedly, and didn't you say that there was nothing of that kind occurred? (Objected to as not proper cross-examination, incompetent, immaterial, and privileged.) Court: You are referring to the grand jury? Defendant's Counsel: I am referring to a time prior to the session of the grand jury; not in the grand jury room, but at her home in Walnut. It is admitted by defend-

2. SAME: Im-
peaching evi-
dence: priv-
ileged com-
munications.

ant's counsel that Mr. Hess at the time was county attorney of Pottawattamie county. (The objection was sustained upon the grounds that it was privileged communication, to which ruling the defendant excepted.) Q. At the time Mr. Hess was talking with you (referring to the conversation at Walnut), is it not a fact that it was not with reference to any prosecution of a criminal case against the defendant, but with reference to another feature of the case? (Objected to as not cross-examination, immaterial, incompetent, and a privileged communication. Sustained. Defendant excepts.) Q. Is it not a fact that, subsequent to the indictment in this case, Mr. Hess, the county attorney, talked with you about this particular case, and about this particular feature of the case, as to what deception or art was practiced upon you at the time of the alleged seduction, and at that time didn't you say to him, in substance, that the only thing he did or said was to make love to you, and to make other statements to you, but that he said nothing about marriage or about protecting you in that way, and that was not the subject of your talk with Harry Hector at any of the times when you were in his company? (Same objection as to the previous question. Sustained. Defendant excepts.) A. I was in the grand jury room only once while the matter was under investigation. I talked with Mr. Turner and Mr. Cullison this week about my testimony, at Mr. Turner's office. I think my father was there. Q. In the conversation with reference to what your testimony in the case would be, wasn't your attention called to the fact that in your testimony before the grand jury you had made no reference to any promise of marriage or the like? (Objected to as incompetent, immaterial, irrelevant, not cross-examination, and privileged. Sustained. Defendant excepts.) Q. And at that conversation, wasn't it suggested to you that that must have been said to you, or that something of that kind was necessary in the case? (Same objection as to the previous question. Sustained. Defendant excepts.) Q. You said that when you were before the grand jury that the reason that you didn't say anything about the promise of marriage or the like was because it was not asked of you. Now I want to know who first asked you that question? (Same objection as to the previous question. Sustained. Defendant excepts.) A. The only persons I talked with concerning my testimony in this case

is Mr. Cullison, Mr. Turner, Mr. Hess, and Mr. Jones of Des Moines; the last named being a lawyer at that place.

The various rulings here shown are assigned as error. That the entire matter may be fully understood, it should also be stated that the then county attorney, Hess, was called as a witness for the defendant, and this extract from the record discloses what happened: "I was in attendance upon the grand jury here in Avoca at the April or May term, 1907, when the matter of the charge against Harry Hector in this case was being presented to the grand jury. I think it was in May, and I was in attendance upon the grand jury at that time. Exhibit A is the indictment in this case, and the writing thereon and the minutes of testimony, excepting the signatures, and the writing on the back of the indictment, are in my handwriting. At that time I acted as clerk of the grand jury in so far as I made the memoranda of the testimony of the witnesses which was afterwards attached to the indictment. I remember the prosecuting witness being before the grand jury at that time. Q. I will ask you to state whether or not the prosecuting witness was asked at that time and place anything with reference to the question whether or not the defendant, Harry Hector, had made any promise of marriage to her in connection with her other testimony in which she said that he had sexual intercourse with her. (Objected to as incompetent, immaterial, and privileged.)"

In connection with this same matter and on this objection, the witness further testified that the grand jury was at the time receiving evidence in this case and in other cases from different witnesses.

The grand jury was in session and duly organized, and I was propounding most of the questions, and occasionally a grand juror might ask one, but I was propounding practically all of the questions. (In connection with this same matter, and the objection urged thereto, the following question was put:) Q. Now at this time, and while the grand jury was so

organized, were there any questions asked by you of the prosecuting witness, Minnie Peterson, as to whether or not, at the time she claims she had been seduced by Harry Hector, that prior thereto, whether or not there had been any promise of marriage by him to her in connection with the seduction?

To this the same objection was urged by the counsel for the state as to the previous question, and by permission of the court, on his examination, testified that he was before the grand jury at that time as the county attorney. The court thereupon sustained the objections made to the previous questions upon the grounds that the prohibition of the statute, section 4608, applied to the county attorney, and the same was privileged, and thereupon defendant excepted to the ruling of the court.

Q. What, if anything, did Miss Peterson say at that hearing before the grand jury with reference to the question or fact as to whether Harry Hector had made her any promise of marriage, or promise to protect her in the event anything should go wrong or anything of that kind? (Objected to as immaterial, incompetent, and privileged. Sustained, and defendant excepts.) Q. At that hearing did you ask her any questions as to whether Harry Hector had promised to marry her or promised to take care of her or protect her in the event anything should happen to her, or any questions of that character? I refer to such time as the grand jury was in session receiving testimony upon this charge against Harry Hector. (Objected to for the same reasons as stated in the previous objection. Sustained on the grounds of privilege, and defendant excepts.) Q. Did you, at that hearing, and while the grand jury was in session, ask the prosecuting witness, Minnie Peterson, any questions as to whether Harry Hector had made her any promise of marriage or promises of any kind in connection with the charge of seduction? (Objected to for the same reason assigned in the objection to the previous question. Sustained, and defendant excepts.) Q. Did she at that time, when the grand jury was in session investigating the matter, give any testimony before the grand jury that Harry Hector made her any promises of marriage or promises to protect her, or take care of her in the event she should become in the family way,

in connection with her testimony that defendant had sexual intercourse with her and seduced her? (Objected to for the same reasons stated in the objections to the previous question. Sustained. Defendant excepts.) Q. I want to ask you whether in this investigation before the grand jury of the charge against Harry Hector, while you were acting as clerk or scribe in taking down the testimony, whether you included in her statement that was signed by her in these minutes, all that she related before the grand jury that Mr. Hector said to her in connection with the charge of seduction as an inducement for her to submit her person to him? (Objected to as incompetent, immaterial, and privileged. Sustained, and defendant excepts.) In connection with the foregoing questions and before ruling thereon, defendant's counsel stated that they expected to show by the witness Hess that the prosecutrix, Minnie Peterson, when examined before the grand jury, and during the giving of her testimony with reference to the offense charged against the defendant, had been asked by Mr. Hess, who was conducting the examination, on several occasions during that examination, whether the defendant had ever promised to marry her, prior to the alleged seduction, and that she replied to such questions that the defendant had never made any promises of marriage to her or any other promises, and that such marriage had never been mentioned or discussed by herself and the defendant.

Defendant also introduced the minutes of the prosecuting witness' testimony attached to the indictment, reading as follows: "Am seventeen years old. Was seventeen on January 28th, this year. Got acquainted with defendant in the fall of 1905. I went out with him a number of times to different places. He said he loved me, and that I was his sweetheart, and that I was the only girl he loved, and always made love to me. I believed him, and he had intercourse with me a number of times. Minnie Peterson."

In the rulings complained of we think there was error prejudicial to the defendant. The prosecutrix first attempted to explain the minutes of her testimony taken before the grand jury by a statement which was not objected to, that

none of the persons examining her had asked about any promise of marriage, and especially to the fact that the county attorney did not ask her any such question. In view of this record it seems to us that it was entirely proper for the defendant to call the county attorney to disprove this statement. In *State v. McPherson*, 114 Iowa, 492, this matter was discussed, and it was held to be within the discretion of the trial court to permit the clerk of the grand jury to testify as to what a witness had testified to before the grand jury. And in *State v. Swafford*, 98 Iowa, 370, it is held in effect that matter called for as in this case was not privileged because made in response to questions by the county attorney in the performance of his duty. Again, in *Foreman v. Archer*, 130 Iowa, 49, it was held that, when a client gave testimony as to what he said to his attorney, the attorney may be permitted to testify as to the same subject-matter. See, also, *Kelly v. Cummins*, 143 Iowa, 148. It is true that in *Gabriel v. McMullin*, 127 Iowa, 426, and *State v. Houseworth*, 91 Iowa, 740, we held that communications made by a prosecutor to the county attorney not in the grand jury room were privileged under section 4608 of the Code, or by reason of public policy; but this holding does not dispose of the question now before us. Here the proceedings were before the grand jury and in the presence of the county attorney, who also acted as the clerk of that grand jury, and prosecutrix had already opened up the subject by attempting to explain why she did not testify before the grand jury as she did upon the trial of the case. Assuming that the matter was within the discretion of the court, we think it was so vital to the case that the county attorney should have been allowed to testify.

II. In arguing the case to the jury counsel for the state indulged in the following remarks: "Walnut is close here, and yet they have not, and I must say it must be inferred that

3. SAME: new trial: misconduct in argument. was the case. They could not in that city find one witness that would testify that this prosecutrix's character, chastity, or reputation for chastity was not, prior to the time of her seduction, was what

these two important witnesses (Clark and Linebach) testified to. Defendant's Counsel: We object to this line of argument. It would not be at all competent for us to show want of chastity by such methods as counsel points out. It is prejudicial and misconduct on the part of counsel. . . . With these falsehoods they made an assault upon the young girl's chastity. They have not disputed her stories. What she said to you about her dealings with the defendant are undisputed. Defendant's Counsel: We take exception to that remark. Mr. Cullison: They have not chosen to dispute it. Defendant's Counsel: We take exception to that remark. Mr. Cullison: It stands unchallenged. Defendant's Counsel: We take exception to that remark."

The first of these remarks should not have been made. *State v. Williams*, 122 Iowa, 115; *State v. Hogan*, 115 Iowa, 455; also, *People v. Aiken*, 66 Mich. 460, (33 N. W. 821, 11 Am. St. Rep. 512). While something like the remarks last quoted have been held not in violation of section 5484 of the Code in *State v. Seely*, 92 Iowa, 490; *State v. Snider*, 119 Iowa, 15, and *State v. Hasty*, 121 Iowa, 507, and other like cases, yet they fall dangerously close to the rules announced in *State v. Trauger*, (Iowa) 77 N. W. Rep. 336; *State v. Baldoser*, 88 Iowa, 55; *State v. Graham*, 62 Iowa, 108, and *State v. Ryan*, 70 Iowa, 154. And while we shall not reverse here because of them, we deem it advisable to caution counsel and all county attorneys and assistant prosecutors against making reference either directly or indirectly to defendant's failure to take the witness stand or to deny the alleged seduction. Here the defendant did not take the stand, and under our practice this was his privilege; and the statute expressly says that no reference shall be made to the fact that he did not testify. Such reference may be made indirectly with as much, if not more, force than if directly charged, and it is quite important that the statute be observed so long as it remains upon the books. Whether or not it should be repealed in the interest of justice is not now before us. Dur-

ing the trial of the case counsel for the state were guilty of many improprieties which should not be repeated if the case is retried.

III. The corroborating testimony is weak, but we think there was enough to take the case to the jury. *State v. Mullholland*, 115 Iowa, 172; *State v. Smith*, 84 Iowa, 522; *State v. Coffman*, 112 Iowa, 8; *State v. Curran*, 51 Iowa, 112.

IV. Instruction 10, given by the trial court, reads as follows:

It must be shown by the state beyond a reasonable doubt that, at the time of the first indulgence of sexual intercourse between the defendant and prosecuting witness, the defendant induced her to have such sexual in-
4. SAME: instruction: seductive arts. tercourse with him as the result of some seductive arts, deception, or promise of marriage or promise, if anything came of it, he would take care of her, made and used by the defendant for the purpose of overcoming her virtue, and which was calculated to and did overcome her will and induced her to surrender her person to him, and but for such seductive means and influence she would have maintained her virtue. The exact amount of seductive means and influence necessary to make out this element of the offense cannot be definitely defined and explained. They depend upon the circumstances of each case. The seductive means and influence which would induce one woman to surrender her person might not have that influence upon another woman; but the seductive means and influence, however, must have been of such character and force as that by reason thereof the said prosecuting witness in this case was led to submit to the intercourse with defendant, and but for such seductive means and influences and promises practiced by the defendant, if any there were, she would have maintained her virtue. On this point it will be proper for you to consider, so far as disclosed by the evidence, the age, education, mental qualities, experience, and strength of mind of the prosecuting witness and of the defendant; their acquaint-

ance, its duration, and intimacy prior to the time of the alleged seduction; their conduct and relations toward each other; what, if any, acts or words of love and affection or flattery and attention the defendant had used towards her prior to the time of the alleged seduction; what, if any, sentiments or feeling of love and affection she at that time bore towards the defendant; what, if anything, he had said or done to kindle the same; and what, if any, control or influence he had over her by reason thereof; what, if any, representations, statements, declarations, promises, or appeals the defendant made, used, or employed prior to or at the time of the alleged seduction which were, if at all, calculated to mislead, influence or deceive the prosecuting witness and cause her through interest, trust in, or love for the defendant, to yield to his desires. And from these matters, if shown by the evidence, and from all the evidence before you, it is for you to say whether this prosecuting witness, Minnie Peterson, was led astray and influenced to yield her person to the defendant by means of some representations, declarations, promise of marriage, or artifice hereinbefore explained."

This is complained of. It has ample support in the testimony and is a correct statement of the law. See *State v. Price*, 157 Iowa, —, decided at present term.

Other instructions complained of are apparently correct, and there was no error in denying defendant's requests.

For the errors pointed out, the judgment must be and it is *Reversed*.

C. G. GASTON, Appellant, v. CHARLES HORN, Defendant, Appellee. EFFIE GASTON, Intervenor, Appellant.

Homestead: ESTABLISHMENT: OCCUPANCY. Merely sleeping in an un-
1 completed house is not sufficient occupancy to constitute a family homestead, where the act was not inconsistent with the purpose of having a temporary sleeping place, and the owner continued to pay rent for another house where he resided and got his meals,

although he may have intended to complete the house and subsequently occupy it.

Real property: CONTRACT: NOTICE OF FORFEITURE: SUFFICIENCY. A notice of forfeiture of a contract providing that if plaintiff should fail to fulfill the terms of said contract, specifying the amount due, a forfeiture would be declared was sufficient, even though the amount specified was to be paid partly in cash and partly by assumption of a mortgage on the premises; as the requirement of the vendee was to fulfill the terms of the contract. And it was not insufficient on the ground that it was a mere threat to declare a forfeiture; as the statute merely requires that the notice shall be a declaration of intention to forfeit the contract.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

TUESDAY, DECEMBER 10, 1912.

IN June, 1908, plaintiff entered into a contract with F. T. True for the purchase of lots seventeen and eighteen in block nine of Benson's addition to Council Bluffs for the sum of \$300, of which \$25 was to be paid January 1, 1909, and the remainder later. On December 14, 1908, the defendant, Horn, furnished plaintiff \$185, of which \$25 was paid to True on the contract, and \$150 to plaintiff, with which to complete the house on the lots, the \$10 to be retained for expense of recording and the like, and by agreement defendant took a deed of the lots from True, and executed to True a mortgage thereon securing the unpaid purchase price of \$275. At the same time defendant entered into a written contract with plaintiff, reciting "that defendant, Charles Horn, has sold the plaintiff for the sum of four hundred sixty dollars (\$460.00), to be paid as follows: One dollar (\$1.00) cash, pay one hundred eighty-five dollars (\$185.00) in eighteen months from the date, and assumes and agrees to pay a mortgage given to F. T. True as security for a note of two hundred seventy-five dollars (\$275.00), with 6 per cent. interest, and also containing the clause that time of payment was the

essence of the contract, and the usual covenant of conveying the title to said premises, by defendant Charles Horn, to C. G. Gaston, upon the performance of said written contract.”

The plaintiff paid the taxes and also the interest on the mortgage to True, but omitted to pay the \$185 owing plaintiff, and on August 10, 1910, defendant caused to be served on plaintiff a notice reciting the amount owing on the contract, his readiness to execute it, and adding: “You are further notified that after thirty days from receipt of this notice by you that the said Charles Horn will declare a forfeiture of all your right, interest, and title to said property named above and the contract hereinbefore referred to, as shown by Exhibit A hereto attached. Should you fail within said time to fulfill your terms of said contract to the amount of five hundred dollars (\$500.00), due the said Charles Horn, and costs of serving of this notice, the said Charles Horn will then declare a forfeiture of said contract as provided by law.” The plaintiff failed to perform, and on this state of facts plaintiff prayed that the deed from True to defendant be declared a mortgage, for an accounting, and that title be quieted in him. The defendant demanded that the petition be dismissed, the contract between him and plaintiff be canceled, that title be quieted in him, and that he be awarded a writ of possession.

Effie Gaston intervened, alleging that at and prior to the transactions on December 14, 1908, she was the wife of and living with plaintiff, that with her family she was occupying the premises as a homestead, and that she had joined in the execution of none of the papers mentioned. She prayed that the homestead be protected, and the claim of plaintiff be decreed not to be a lien thereon. Another action was brought by defendant at about the same time, but was consolidated with this. On hearing, the petition and petition of intervention were dismissed, and title quieted in defendant as prayed. Both defendant and intervener appeal.—*Affirmed.*

Thomas Q. Harrison, for appellants.

John Fletcher, for appellee.

LADD, J.—The plaintiff had purchased two lots of True, and afterwards arranged with Horn to pay True \$25 on the price, and procure a deed thereof from True, and execute to him a mortgage thereon to secure the remainder of the purchase price. This was done, and, having loaned plaintiff \$185 in addition thereto, defendant executed a contract to convey the lots to plaintiff upon the payment of the \$185, with interest, in eighteen months, the grantee to assume the mortgage to True. The plaintiff's wife did not join in these transactions, and in her petition of intervention alleged that the premises were the homestead of herself and family, and prayed that it be protected against the claim of defendant. Whether it was such, and whether the contract described was forfeited, are the only issues submitted for review.

I. The testimony bearing on the occupancy of the premises as a homestead is not such as to warrant interference with the decision of the trial court that it was not
1. HOMESTEAD :
establishment : so occupied. Plaintiff and his sons may have
occupancy. slept there previously, and a trunk, some bedding, and possibly other articles, may have been taken there from the house near by where they lived; but the house was not then habitable. Only a part of the roof was on, and the windows were uncased. According to one witness, who is undisputed, the doors and windows were nailed in during the winter, and plaintiff admitted he did not sleep there when "too awful cold." He continued to pay rent for the place where he had resided and get his meals there, though he explained that the payment of rent was for his daughter and son-in-law. Merely sleeping in a roofless house is not alone sufficient occupancy of the premises to constitute them a homestead, any more than sleeping in a tent, or with only the skies above. It is entirely consistent with another pur-

pose, as that of having a temporary place to sleep, and that it was so used is confirmed by the testimony. The design in borrowing the money was to complete the house therewith, so as to render it habitable, and the district court rightly held that he did not enter into its occupancy as a home until the spring of 1909. The case is readily distinguishable from *Neal v. Coe*, 35 Iowa, 407, which involved the change of homesteads, and, of course, some time was required to effect such change, and according to subsequent decisions this is a reasonable time. *Robinson v. Charleton*, 104 Iowa, 296; section 2981, Code. Here the inquiry is: When did the homestead character first attach? And, as said, this was long after the transactions under consideration, and when actually occupied as such.

II. The notice of forfeiture described the contract, and indicated that, if plaintiff should "fail to fulfill the terms of said contract, the amount of \$500, due

2. REAL PROP-
ERTY: contract:
notice of for-
feiture: suf-
ficiency.

Charles Horn, and costs of serving of this notice, the said Charles Horn will declare a forfeiture of said contract as provided by law."

Counsel for appellant argue that this exacted payment of the \$500 to Horn. Not so, for it merely called upon the vendee to fulfill the terms of the contract, which were that he pay the \$185, with interest, and assume the payment of the \$275 to True. It is said that the notice of forfeiture merely threatens to declare a forfeiture, but none is shown to have been declared. All the statute requires is that the notice "shall contain a declaration of an intention to forfeit said contract, and the reason therefor." Defendant's cross-petition for cancellation was sufficient declaration of forfeiture.

The decree quieting title in defendant is *Affirmed*.

CITY OF COUNCIL BLUFFS V. ILLINOIS CENTRAL RAILROAD COMPANY, DUBUQUE & SIOUX CITY RAILROAD COMPANY, Appellants.

Municipal corporations: ORDINANCES: REASONABLENESS. An ordinance requiring a railway company to construct and operate gates at a certain street crossing during all hours was not invalid, because imposing an unreasonable burden, even though for two and one half hours out of the day no street cars were ordinarily operated over the street, and no pedestrians traveled the street at such time.

Same: RAILWAY CROSSINGS: GATE REGULATIONS: STATUTES: ORDINANCES. An ordinance requiring gates at street crossings of steam and interurban railways, in accordance with the statute authorizing cities to require gates upon the public streets at railroad crossings, and the statutes making interurban railways street railways within the city and subject to the same law, was not void because inconsistent with other provisions of the statutes regulating the method of crossing of steam and interurban electric railways; as the the latter statutes relate to crossings outside the city limits.

Same: ORDINANCES: DISCRIMINATION. An ordinance requiring railway companies to maintain gates at a street crossing, at the intersection of steam with an electric railway, was not objectionable as discriminating in favor of natural persons and against corporations; as the ordinance applied to either a corporation or an individual operating a railway at such crossings.

Same: MANDAMUS: DEFENSES. It is no defense to an action to compel a railway company to erect and maintain crossing gates at the intersection with a street railway, that the ordinance also required the street railway to maintain gates at the same crossing, and that it had not complied therewith.

Same: CONSTRUCTION OF ORDINANCE. An ordinance requiring gates for the protection of the public at a street crossing, and at the intersection of a railroad with an electric line, was not objectionable as requiring a watchman as distinguished from an operator of the gates.

Same: ORDINANCES: TITLE. The ordinance in this case was not objectionable as embracing more than one subject, and distinct matters not covered by the title.

Same: MANDAMUS. Mandamus is the proper remedy to compel a railway company to comply with an ordinance requiring the construction and maintenance of gates at street intersections.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

TUESDAY, DECEMBER 10, 1912.

ACTION in mandamus to compel defendants to install and operate gates at a street intersection. Judgment for plaintiff. Defendants appeal.—*Affirmed.*

Kelleher & O'Connor, Tinley & Mitchel, and Helsell & Helsell, for appellants.

C. F. Kimball and D. E. Stuart, for appellee.

SHERWIN, J.—Avenue A, in the city of Council Bluffs, runs east and west, and Eighteenth street is a north and south street crossing Avenue A. The railway tracks of the appellants run north and south on Eighteenth street crossing Avenue A. The main line of the Omaha & Council Bluffs Street Railway between Council Bluffs and Omaha is a double-tracked road running on Avenue A, and crosses appellants' track at Eighteenth street. The appellants maintain switch tracks both north and south of Avenue A and near thereto. The street railway has a large passenger business between Council Bluffs and Omaha, and runs its cars over the crossing in question, in its ordinary operation, from 4:27 a. m. until 2 a. m., and at the time of the trial it was operating a nine-minute schedule with double service during rush hours in the morning and evening. In the regular service, aside from extras, there were about two hundred and

fifty-two cars crossing this intersection daily, and, in addition thereto, there were thirty-four extras morning and evening. There are no sidewalks on Avenue A at this point, nor is the avenue used to any extent by vehicles other than the street cars. Some distance west of this intersection there are many residences, and the record shows that there is considerable travel by foot along the street car tracks over and west of this intersection. But it may fairly be said that the purpose of the city in requiring the appellants to establish and operate gates at this point was to protect the great number of people who use the street cars crossing appellants' tracks. In December, 1907, the plaintiff city passed an ordinance, known as No. 376, which was entitled as follows: "An ordinance to compel railroad companies to erect, construct, maintain and operate suitable gates upon certain public streets at railroad crossings and providing regulations therefor."

I. On the 10th day of February, 1908, the city passed an ordinance that was entitled as follows: "An ordinance amending an Ordinance No. 376, to compel railroad companies to erect, construct, maintain and operate suitable gates upon certain public streets at railroad crossings and providing regulations therefor, and repealing ordinances in conflict therewith." This last ordinance required railroad companies owning or operating tracks "at the intersection of Avenue A on 18th street points to at once erect, construct and maintain, without expense to the city, on both sides of such tracks and right of way where the same cross and intersect said streets, suitable gates operated by hand, or other power, to protect and warn the traveling public by closing same during the passage of trains or when the cars, engines or trains are about to pass upon and over said streets, and crossings." This ordinance provided that it should be in force and effect from and after its passage, approval, and publication, and it also required a copy of the same to be served upon each of the companies owning or operating the said railways crossing said streets. This ordinance repealed Ordi-

nance No. 376. It was approved February 14, 1908, and was duly published, and a copy thereof served on both of the defendants herein on the 2d day of March, 1908. The defendants have consistently refused to comply with this ordinance. The first of the appellants' contentions meriting our attention is their claim that the ordinance is unreasonable and void, because appellants are required to operate the gates at all hours of the day and every day in the year. The only basis for this claim is the fact appearing in the record that ordinarily street cars are not operated over this crossing between the hours of 2 a. m. and 4.27 a. m., a matter of about two and a half hours in the early morning. It may also be presumed that ordinarily the public will not use this street for a footway between the hours mentioned, but the fact remains that exigencies may require the use of the street cars during the time in question, and that the street may be used at all hours of the night by foot travelers. An ordinance will not be held void because unreasonable, unless it clearly appears that it imposes an unreasonable burden as a whole. While it may be that public interests would be fairly well subserved without the service during the two and one-half hours in controversy, we cannot say that the city has so abused its discretionary power in the matter as to require us to interfere by declaring the ordinances void for unreasonableness. The authorities relied on by appellants are not controlling, because the facts upon which they are based are not similar to the facts here.

II. Appellants further contend that the ordinance is void because inconsistent with the state statute regulating the method of crossing at intersections of steam and interurban electric railways. It is very doubtful whether this line of street railway, extending only from Council Bluffs to Omaha, Neb., and exclusively within the corporate limits of both cities, is an interurban railway within the meaning of Code Supplement, sections 2033a, 2033b. But, however that may be, we are confident that there is no conflict between the ordi-

nance and the state statute, because of the express power given to cities of this class by section 769 of the Code, and because of section 2033-c, Code Supplement. Section 769 expressly authorizes cities of this class to compel railroad companies to erect and maintain gates upon public streets at railroad crossings, and section 2033-c provides as follows: "Any interurban railway shall within the corporate limits of any city or town, or of any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages, and freight as it may carry in its passenger or combination baggage cars only be deemed a street railway, and be subject to the laws governing street railways." The state statute was evidently intended to regulate crossings outside of cities, and not to interfere with the authority of cities within their limits, and such construction gives force and effect to all of the statutes on the subject, while no other construction would do so. Furthermore, it is not solely a question of the crossing of two railroads. The matter of a public street is involved, and, to some extent at least, the protection of the public not using the street railway.

III. The appellants' claim that the ordinance is void because it discriminates in favor of natural persons and against corporations is hypercritical in the extreme. There is not a shadow of merit in the position so far as this case is concerned, because the ordinance requires the establishment of a gate at this particular point, and this would compel either a corporation or an individual operating a railroad over the crossing to maintain such gates.

IV. It is said that the language of the ordinance requires gates to be maintained by the interurban railway equally with the steam railroad at the same intersection. If it be conceded for the purpose of argument that the street railway is properly an interurban road, the appellants need not be concerned with the requirements of the ordinance beyond its own affairs. If it was the intention of the city

to have both streets guarded by gates, it can attend to the matter itself.

V. The ordinance does not require a watchman, as distinguished from an operator of the gates, and is clearly within the power of the city.

VI. It is further contended that the ordinance is void because "it embraces more than one subject and distinct matters not covered by the title." There is nothing in the point. An examination of the title thereto, in connection with the title to Ordinance No. 376, leaves no room for doubt on this subject, and everything enacted in the ordinance is distinctly referred to in the title. The ordinance in question was in form in accordance with section 681 of the Code, which provides that "no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed."

VII. Mandamus is the proper remedy here. *Swinney v. C., R. & P. Ry. Co.*, 123 Iowa, 219.

One or two other complaints are made by appellants, but they are not of sufficient moment to require specific mention.

The judgment is *Affirmed*.

JOSEPH A. JOHNSON v. C. H. CONVERSE, Appellant.

Contracts: PERFORMANCE: DEMAND: DAMAGES. Where the grantor of land, as one of the provisions of the contract of sale, agreed to take up and carry for a definite time a mortgage assumed by the grantee in case the mortgagee would not extend the time of payment, the grantee was not bound to ascertain whether the mortgagee would extend the same prior to the date of its maturity, or to demand of the grantor on the date of its maturity that he take the same up, to authorize recovery of damages for breach of the agreement; but it was sufficient if he gave notice and made such demand within a reasonable time.

Appeal from Pottawattamie District Court.—HON. O. D. WHEELER, Judge.

TUESDAY, DECEMBER 10, 1912.

ACTION to recover damages for breach of written contract. By answer the defendant put in issue the allegations as to breach. There was a verdict and judgment for plaintiff, and the defendant appeals.—*Affirmed.*

I. D. Shuttleworth and C. H. Converse, for appellant.

A. L. Preston, for appellee.

McCLAIN, C. J.—Prior to December 11, 1904, plaintiff had purchased from defendant a farm, with provision in the contract that the plaintiff assume the payment of a mortgage for \$5,000 which had been recently executed by defendant, and which would fall due on that date. The contract contained this further provision: "And Converse agrees that in case the party holding the said mortgage refuses to extend the time of payment when due, for another period of five years, that he will take up the same, pay it off and hold it, to be paid by Johnson to Converse at the same rate of interest." It appears without controversy in the evidence that on the day after the date of maturity of this mortgage plaintiff spoke to defendant with reference to its renewal, whereupon defendant objected that he had not been notified of refusal of the mortgagee to extend, and that he was not prepared to take care of it. Thereupon plaintiff communicated with the party representing the mortgagee (then deceased), and ascertained that the mortgage would not be extended. He caused his attorney on January 27th following to write a letter to defendant, who was then in another state, advising defendant that plaintiff was unable to get the mortgage renewed without expense, and giving to defendant the option to take it up and

carry it or pay the expense of the renewal. Upon failure of defendant to comply with either of these conditions, and after further conference between the parties on the subject, defendant at no time indicating a willingness to either take up the mortgage or secure another mortgage to cover the indebtedness, plaintiff brought this action for damages in the amount of the expense necessarily incurred by him in procuring another loan, including an increase of interest which it became necessary for him to pay in order to secure the money by mortgage on the land.

Defendant's theory throughout seems to have been that it was plaintiff's duty to ascertain before the mortgage matured whether an extension would be granted, and notify defendant of that fact, demanding at the same time a performance of the condition of the contract; and an instruction to that effect was asked for the defendant. This theory is evidently untenable. There is nothing in the stipulation requiring notice or demand on the day of the maturity of the mortgage. The court left it to the jury to say whether notice and demand were within a reasonable time, and we think this was the proper construction of the effect of the contract.

A further contention for appellant seems to be that, after ascertaining that the mortgage would not be extended, plaintiff without notice to the defendant incurred expense in procuring a new mortgage. But it appears without conflict in the evidence that at no time was the defendant willing to perform the obligation of his contract to take up the mortgage by paying it off and to hold it as an obligation of plaintiff; and it further appears that plaintiff had not concluded his negotiation of a new mortgage until some time after defendant was formally notified of plaintiff's requirement that the mortgage be taken up or renewed at defendant's expense. The question whether plaintiff incurred unnecessary expense in securing a new mortgage was left to the jury under proper instructions. Although the instructions given by the court are subjected to some verbal criticism on behalf of appellant,

we have been unable to discover, after carefully noticing the points made in the argument, that there was any error therein. The criticisms are predicated on the erroneous view of defendant as to his obligations under the agreement.

Finding no error in the record, the judgment is *Affirmed*.

THE STATE OF IOWA, Appellee, v. EVAN THOMAS, Appellant.

Criminal law: EVIDENCE: LEADING QUESTIONS. A cause will not be
1 reversed upon the single ground that the trial court improperly permitted the asking of leading questions, especially in cases of embarrassment, reticence or dullness of the witness, unless there has been a manifest abuse of discretion.

Same: ADMISSION OF FORMER EVIDENCE. Where a part of the testi-
2 mony given on the former trial, but could not be produced at the second trial, was read by the reporter at the instance of defendant, the state was entitled to the balance, for the same reason that the party against whom part of a conversation is admitted is entitled to have the remainder admitted.

Same: EVIDENCE: CORROBORATION. Evidence that defendant, in a
3 prosecution for seduction, waited upon the prosecutrix, was frequently with her upon the streets and other places at night, and that when told of her pregnant condition and her claim that he was the author to her shame, said that he was not trying to get away and aimed to make it right, was sufficient corroboration to take the case to the jury.

Same: RE-OPENING CAUSE: FURTHER EVIDENCE. The court has power
4 to allow a witness to be heard for the purpose of correcting his testimony at any time before the issues are submitted to the jury, and even during the closing argument to the jury.

Same: INSTRUCTION: CORROBORATION. The instruction in this case
5 that if there was evidence aside from that of the prosecutrix tending to show that defendant was on intimate terms with her, and that he conducted himself toward her as a lover or suitor, or caressed or manifested apparent affection for her, such facts were proper to be considered on the question of corroboration, was not so prejudicial, in that there was no evidence of caresses, as to require a reversal, even though the jury may not be presumed to have

observed the warning not to go beyond the evidence regarding these matters.

Appeal from Page District Court.—HON. O. D. WHEELER,
Judge.

WEDNESDAY, DECEMBER 11, 1912.

THE defendant was convicted upon a charge of seduction, and appeals.—*Affirmed.*

T. S. Stevens and Parslow & Peters, for appellant.

Geo. Cosson, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.

WEAVER, J.—The defendant was indicted upon the charge of seducing one Lizzie Baetge, and in support of his appeal for a reversal of the judgment entered against him makes the following points:

I. In the examination of the complaining witness, she had said, in substance that she would have yielded to plaintiff's solicitation for intercourse even if he had not promised to marry her, but in further testimony, and in response to a direct question by the county attorney, she was permitted, over defendant's objection, to say that she did not yield until there was a promise of marriage. Error is assigned on the ground that such testimony was elicited by leading interrogatories by the prosecutor. The inquiry, as shown by the record, was undoubtedly leading, but we do not think there was reversible error in allowing it. Very few cases will be found where judgment has been reversed upon the single ground that the trial court improperly permitted counsel to put leading questions to a witness. It is safe to say that this is never done except in a very clear case of abuse of dis-

1. CRIMINAL LAW:
evidence: leading
questions.

cretion by the trial court. It often happens because of the embarrassment or reticence or dullness of a witness, and especially in this class of cases, that direct and leading questions are necessary in order to elicit the information which such witness is able or believed to be able to give. The trial court is in a position to observe and know the circumstances as we cannot, and the presumption of judicial fairness and proper discretion will prevail unless there is a manifest showing to the contrary. The record before us is not of that character, and the objection must be overruled. The rule here applied is too familiar to require a citation of authorities.

II. One Spring, who had testified in the case on a former hearing, could not be produced on the last trial below, and, on the call of the defendant, the
2. **SAME: admission of former evidence.** shorthand reporter took the stand and read to the jury from his notes of a former trial a part of Spring's testimony. On the demand of the state, and over defendant's objection, the reporter was allowed to read the remainder of this witness' examination to the jury, and to this exception is taken. We think the ruling was correct. The law applicable in such case is akin to that which permits a party against whom part of a conversation is given in evidence to have the remainder thereof admitted. No authority holding otherwise is called to our attention. We have examined the evidence of this witness as it is found in the record, and no material part of it seems to be so foreign to the matter called out by the defendant himself as to give him any just ground of complaint because of its introduction.

III. It is argued that there is no sufficient corroboration of the testimony of the complaining witness to justify submitting the question to the jury. While
3. **SAME: evidence: corroboration.** the corroboration is not overwhelming, we think it is sufficient. Corroboration in nearly all cases of this character is of necessity circumstantial only.

In this case the witness is supported in her claim that, at or about the time of the alleged offense, defendant waited upon her, was frequently in her company, attended her, and was upon the streets and other places together with her at night. When the complaining witness was found to be pregnant, and her friends called upon the defendant with reference to her claim that he was the author of her shame, he said he was not trying to get away and would make it right, or that he "aimed to make it right." Corroboration of the character we have above described was held by this court sufficient to take the case to the jury in *State v. Smith*, 84 Iowa, 522; *State v. McClintic*, 73 Iowa, 663; *State v. Wells*, 48 Iowa, 672. It may also here be said that for reasons already stated, defendant's claim that upon the whole case the testimony is insufficient to sustain the verdict cannot be upheld.

IV. The next point and the one on which counsel most vigorously contend for a reversal has reference to a some-

4. SAME: re-open-
ing cause: fur-
ther evidence.

what singular episode attending the submission of the case. It appeared in evidence that the complaining witness gave birth to a child on August 29, 1910. According to her story, her pregnancy resulted from intercourse with defendant which occurred first on November 14, 1909, and was repeated at various times after that date. On the part of the defendant, it was claimed that on the evening of November 26, 1909, a date substantially nine months before the birth of her child, the complaining witness attended a "box social" at a local schoolhouse in company with another young man, one Brokaw, and that they went away from the schoolhouse together and alone. Their presence at the box social was testified to by several witnesses, as was the fact that about the same time Brokaw had accompanied the girl to one or more other entertainments. To fix the date of this social, the school-teacher, Mrs. Hobson, having charge of the affair, was called as a witness and testified that it occurred on November 26, 1909, and

that she was able to fix the date with exactness because she deposited the proceeds of the social in a bank on the following day, and the entry of the deposit in her passbook was dated November 27, 1909. No other witness seemed to be able to speak of the true date with the same degree of certainty; and, as the candor of Mrs. Hobson was not open to question, counsel for the defense naturally made this item of evidence a leading topic of discussion in their address to the jury, and argued therefrom that the pregnancy of the complaining witness and birth of her child should be attributed to her association with Brokaw rather than the defendant. During the closing argument for the state, it was announced to the court that Mrs. Hobson desired leave to correct her testimony, and over the objection of the defendant she was permitted to do so. She then testified that the true date of the social was October 29th and not November 26th. She explained the confusion and mistake by saying that, while it was true that she took the money to the bank on the day following the social, she then took a certificate of deposit for it, and did not have it transferred to her open account and entered upon her passbook until the later date. In giving her first testimony she did not recall the incident of taking the certificate of deposit, and had been misled by the book entry. After receiving this testimony, the court reopened the case for argument on behalf of the defendant, and permitted his counsel to again address the jury. It is insisted that there was error in allowing such correction to be made. Counsel concede that the witness acted in perfect good faith, and that she was doubtless mistaken in her first statement of the date; but it is said that, the defense having been misled into laying great stress upon the supposed fact and arguing it to the jury as making it extremely probable that another person than defendant was the father of the child, the subsequent correction of the evidence must have had great, if not decisive, effect in influencing a verdict of guilty. There is no doubt counsel offered the original testi-

mony in entire good faith, and they were justified in regarding the point so made as one having direct tendency to discredit the case of the state. It may well be believed, also, that its subsequent correction was a serious blow to the defense, and had more or less weight in the deliberations of the jury. But it must not be forgotten that the primary purpose of the trial was neither the acquittal nor the conviction of the defendant, but to ascertain with the requisite degree of certainty the truth of the matter charged in the indictment. To that end, as a general rule, all competent and material evidence was admissible. If the case had not reached a stage in the procedure where the court was without authority to permit it to be made, the correction of a mistake upon a material matter of evidence is so manifestly in accord with the very purpose for which courts of justice have been created that its propriety ought not to be considered open to question. No man ought to be convicted upon false or mistaken testimony. It is equally true that no man on trial for crime should secure an acquittal upon testimony of that character where the mistake is discovered before the case is closed and submitted. That the court had jurisdiction and authority to allow the witness to be heard at any time before the issues were submitted to the jury there can be no doubt. It is expressly provided for by statute (Code, section 3719), and even in the absence of any statute we see no tenable ground for denying the existence of inherent power in the court to make such order in the furtherance of justice. *State v. Shean*, 32 Iowa, 88; *Darland v. Rosencrans*, 56 Iowa, 122; *Miller v. Insurance Co.*, 70 Iowa, 704.

5. The court, instructing the jury upon the subject of corroboration, said that evidence of mere opportunity to commit the offense was not sufficient to satisfy the statute, but added that, if there was evidence before the jury outside of the testimony of the prosecuting witness tending to show that

5. SAME: instruction: corroboration.

defendant was on intimate terms with the girl and demeaned himself as her lover or suitor, or caressed her or manifested apparent affection for her, such facts were proper for consideration upon the matter of alleged corroboration. This is said to be erroneous because there is no evidence of any circumstances of the kind thus enumerated. Except, perhaps, as relates to the matter of caresses, there is sufficient to justify the instruction. It does appear from statements of other witnesses that defendant was waiting upon the complainant, kept company with her, and attended her to places of public amusement. He was seeking her society and favor. His attentions were evidently sufficiently assiduous to attract the notice of their mutual acquaintances, and we are of the opinion that the jury would have been justified in finding that his conduct was such as ordinarily marks the lover or suitor. The use by the court of the word "caresses" was perhaps not well advised, but we think it involves no reversible error. The clause is introduced by the expression, "if there is evidence," and the jury is thereby warned that it is not at liberty to go beyond the facts established by the testimony. We may reasonably assume that the jury obeyed the court's instruction. Moreover, if it be denied that this is an allowable presumption, we are inclined to say that a single verbal error of that kind worked no conceivable prejudice to the defendant, and will not justify the ordering of a new trial. The case seems to have been fairly tried, and we find no cause for reversal.

The judgment below is therefore *Affirmed*.

THOMAS H. LANSING, Appellee, v. BEVER LAND CO. and A. W. COQUILLETTE, Appellants.

Partnership: ENTITY: JUDGMENT. A partnership is a distinct entity. 1 and a judgment against it is not a judgment against the individual members of the firm.

Same: EXECUTION: DESCRIPTION OF DEFENDANT: LEVY. Where the
2 defendant named in an execution appears to be a partnership, a
partnership will be inferred, as the defendant need not be so desig-
nated in the writ; and where that is the only recital descriptive
of the judgment defendant, a levy on the individual property of
a member of the firm is unauthorized.

Same: ACTION AGAINST PARTNERSHIP: APPEARANCE OF PARTNERS INDI-
3 **VIDUALLY.** The fact that individual partners, on the trial of a
counterclaim filed in an action brought by the partnership, em-
ployed counsel, gave evidence and advised and assisted in the
defense of the counterclaim, was not such a personal appearance
to the action as to bind them individually by the judgment; as
these were matters which they might have done as agents of the
firm. And the same rule obtains where the partners were named
as parties and not served with notice.

Judgments: AMENDMENT. While a judgment may be amended to
4 show facts different from those recited therein, this cannot be
done in a collateral proceeding.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

• WEDNESDAY, DECEMBER 11, 1912.

SURT in equity to cancel the levy of an execution upon
certain real estate belonging to plaintiff, to enjoin a sale un-
der said execution, and for other equitable relief. To an an-
swer filed by defendants, plaintiff demurred; and from a
ruling sustaining the demurrer defendants appeal.

On rehearing.—*Affirmed.*

Jamison, Smyth & Hann, for appellants.

Rickel & Dennis, and *J. H. Preston*, for appellee.

DEEMER, J.—Under a case entitled *Young & Lansing*,
Plaintiff, v. *Bever Land Co.*, Defendant, an action at law
was brought in the superior court of the city of Cedar Rapids
to recover rent paid the defendant, which it is alleged was
a corporation, for a building which was destroyed by fire

before the expiration of the term for which the rent was paid. In the petition no allegation was made as to the nature of the plaintiff, but it was averred that "the lease was assigned to F. M. Young and T. H. Lansing, the plaintiffs herein." Judgment was asked for plaintiffs in the sum of \$164.59. The defendant, Bever Land Company, appeared to that action, and filed a counterclaim against Young & Lansing, T. H. Lansing and F. M. Young. A reply was filed to this counterclaim, and upon the issues joined the case was tried, resulting in a judgment for the Bever Land Company against Young & Lansing alone. The exact prayer of the counterclaim was that defendant have judgment against F. M. Young and T. H. Lansing, and against the firm of Young & Lansing, in the aggregate sum of \$6,493.14. So that the judgment on its face denied the relief asked against the two parties named. Upon appeal to this court, under the title given in the original case, the judgment was affirmed. Thereafter an execution issued to the sheriff of Linn county, which contained the following recitations and directions: "Whereas, a judgment against Young & Lansing for the sum of six thousand seven hundred and ninety-eight dollars and forty-two cents (\$6,798.42) damages, with interest thereon at the rate of six per cent. per annum, and two hundred and sixty-two dollars and thirty-five cents (\$262.35) costs, was rendered by the superior court of the city of Cedar Rapids, Iowa, . . . on the 13th day of February, A. D. 1908, in an action wherein Young & Lansing were plaintiffs, and Bever Land Company, defendant, and afterwards on the 17th day of December, A. D. 1908, transcript of said judgment duly certified to by the clerk of said superior court was filed in the office of the clerk of the district court of said county, and a memorandum thereof by said clerk entered in the proper judgment docket of his office, and it appearing from the record of said cause that all of said judgment, the interest thereon, and costs still remain unpaid: These are, therefore, in the name and by the authority of the state of Iowa, to command you

that of the goods, chattels, lands, and tenements of the said Young & Lansing, if sufficient be found in your county which are not exempt from execution, you cause to be made the said sum, with interest and costs and accruing costs, by levy and sale thereof, according to law." Pursuant to this execution the sheriff made the following return: "I hereby certify that on the same day I levied upon and attached as the property of Thomas H. Lansing and Thomas H. Lansing & Co., the following property, to wit: . . . Also the stock standing in the name of Thos. H. Lansing and Thos H. Lansing & Co. in the Allison Hotel Co. of Cedar Rapids, Iowa, and that on the same day I served notice of said levy as shown by return on notices hereto attached. Levy on real estate and the stock in Allison Hotel Co. made this 10th day of December, 1908."

This action was brought to restrain the enforcement of the execution, upon the ground that plaintiff's property could not be taken upon an execution running against Young & Lansing, and the return shows that the property levied upon belonged to Thos. H. Lansing and Thos. H. Lansing & Co. The claim for appellant under this record, and the whole thereof, is as follows:

On February 13, 1908, a judgment was entered in the superior court of the city of Cedar Rapids, Iowa, against Young & Lansing for the sum of six thousand seven hundred and ninety-eight and $\frac{42}{100}$ dollars (\$6,798.42), and cost taxed at two hundred sixty-two and $\frac{35}{100}$ (\$262.35) dollars. Prior to said February 13, 1908, F. M. Young and T. H. Lansing commenced suit in the superior court of Cedar Rapids against the Bever Land Company to recover a sum of money claimed to be due said Young & Lansing on account of a certain building as the Clifton Hotel in the city of Cedar Rapids, Iowa, becoming untenable by reason of a fire which wholly destroyed the same, and that the said Young & Lansing under and by virtue of the lease of said building from the Bever Land Company, which required payment in advance for the rent of said building, said Young & Lansing had paid for a

portion of a month, and had not had the use of the building which had been destroyed by fire. To this petition the Bever Land Company appeared and answered, and filed in addition to said answer a counterclaim against Young & Lansing, T. H. Lansing, and F. M. Young, constituting a copartnership of Young & Lansing, in a large sum. An answer was filed by Young & Lansing to the counterclaim of the Bever Land Company. A trial was had in the superior court, lasting several days, and which resulted in a verdict of the jury against Young & Lansing on the counterclaim in the sum of six thousand seven hundred ninety-eight and $\frac{42}{100}$ (\$6,798.42) dollars. . . . The judgment of the superior court of the city of Cedar Rapids was transcribed to the district court of Linn county, Iowa, and an execution issued thereon and levied upon certain real estate and personal property of T. H. Lansing to satisfy said judgment. Thereupon T. H. Lansing filed his petition in the district court of Linn county, Iowa, praying for a temporary and permanent injunction to enjoin the enforcement of said execution against his individual property. A temporary writ of injunction was issued. Thereafter the Bever Land Company appeared, filed its answer, set up the proceedings had and done in the superior court of the city of Cedar Rapids, and especially averring that T. H. Lansing had appeared in the superior court of the city of Cedar Rapids, Iowa, and had hired lawyers and conducted the defense made by Young & Lansing, T. H. Lansing, and F. M. Young, and that because of said facts the said execution was valid and enforceable against the individual property of T. H. Lansing. . . . The ultimate question to be determined under the allegations of the petition of the plaintiff and the answer and amendment thereto of the defendant is as to whether T. H. Lansing's individual property is liable under the execution issued upon a judgment against Young & Lansing.

I. While some controversy has arisen since the original brief was filed as to the nature of the case, and the claims made by the respective parties, this was the only point relied upon for a reversal when the cause was originally submitted, and we do not think any other question is now involved. Indeed, it is ap-

1. PARTNERSHIP:
Identity: judgment.

parent from the counterclaim filed in the original case that defendant, Bever Land Company, was making its claim against a partnership known as Young & Lansing and against the individual members, naming them, and that it obtained its judgment against Young & Lansing alone, which it averred in its counterclaim was a copartnership. No matter, then, what the defects in the original petition filed by "Young & Lansing," the defendant by its counterclaim introduced an original cause of action, which it claimed to have against three parties, and asked judgment against each. In fact, it recovered against one, and that one was Young & Lansing; and in its counterclaim it averred that Young & Lansing was a partnership. A partnership under our law is a distinct entity, and the judgment against it was not a judgment against the individual members of that entity or artificial person known as a partnership. *Brumwell v. Stebbins*, 83 Iowa, 425; *Mason v. Rice*, 66 Iowa, 174; *Anderson v. Wilson*, 142 Iowa, 164; *Sullivan v. Nicoulin*, 113 Iowa, 82; *Graham Co. v. Wohlwend*, 116 Iowa, 358.

The judgment, then, was against a partnership as such, and the execution following the judgment recites a judgment against Young & Lansing, and directs that

2. **SAME:** execution: description of defendant: levy. of the goods of Young & Lansing by levy and and sale thereof a sufficient amount be raised to pay the aforesaid judgment. From the use of what appears to be a partnership name in an execution, a partnership will be inferred; for there is no necessity of a recital of a partnership in such a writ, although such an allegation may be necessary in a pleading. *D. & S. W. R. Co. v. Akerman*, 2 Ga. App. 746 (59 S. E. 10). As the judgment was against Young & Lansing, and the execution directed a levy and sale of the property of Young & Lansing, the officer was not justified in levying upon the individual property of T. H. Lansing. Code, section 3960, provides that: "The execution must state the names of the parties to the action, and if it is against the property of the judgment debtor, it shall re-

quire the sheriff to satisfy the judgment and interest out of the property of the debtor subject to execution." And section 3969 says: "The officer must execute the writ by levying on the property of the judgment debtor."

In *Mason v. Rice, et al.*, 66 Iowa, 174, the court had this exact question before it, and we then said:

The clerk doubtless took this view of the question, for the writ which he issued commands the sheriff to attach the property of I. N. Rice & Co. It contains no reference to the individual members of the firm or their property. The name of defendant Beebe is not mentioned in the writ, nor does it contain any recital which in any manner indicates that he is a partner in the firm. The writ, then, clearly did not empower the sheriff to levy on his individual property. The only power which the officer had in the premises was expressed in the mandate of the writ, and by that he was empowered to attach the property of the partnership alone. The attachment, then, was sued out by plaintiff against the property of the firm, and it empowered the sheriff to levy on the firm property only. But the officer without right or authority attached the individual property of defendant Beebe. The injury, then, which defendant has sustained, was occasioned, not by the wrongful suing out of the attachment, but by the wrongful act of the sheriff in seizing his property on the writ. As the injury of which he complains was caused by the trespass of the officer, and not by the suing out of the writ, the question as to his remedy is not at all affected by the fact that he is a party to the suit in which the attachment was issued, and that the writ might have been issued on the allegations of the petition against his property, as well as that of the partnership. His right of action is against the wrongdoer by whose trespass he has been damaged, and not upon the bond.

This rule settles, as it seems to us, every question in the case. True, as we shall presently see, defendants contend that, as they might have had judgment against the individual members of the firm because of their appearance in the case, they are entitled to enforce this execution against the

separate property of Thos. H. Lansing. But the case just cited clearly negatives this thought, and there is really no need of pressing the inquiry further. Counsel for appellant claim, however, that as the judgment and execution ran against Young & Lansing, without other designation, they are entitled to enforce it against either or both. The difficulty lies in identifying the parties as F. M. Young and Thos. H. Lansing.

II. The real point made for appellant is that although the judgment against a partnership alone, and the execution

also was directed against partnership property, still in virtue of the allegations of the answer, to which the demurrer was sustained, they are entitled to have the execution satisfied out of the individual property of Thos. H. Lansing, because he was one of the partners and entered an appearance in the original case. The only material allegations of the answer in this connection are:

3. SAME: action against partnership: appearance of partners individually.

That the plaintiffs were represented by Attorneys John A. Reed, W. E. Steele, and Henry Rickel, of the firm of Rickel & Dennis; that upon issues joined upon said counterclaim a trial was had before the court and a jury, lasting a number of days, and that a verdict was returned by the jury in favor of the Bever Land Company and against the plaintiffs for \$6,798.42; that upon said verdict judgment was entered by the superior court of the city of Cedar Rapids, Iowa; . . . that at the time of the commencement of said suit in the superior court of the city of Cedar Rapids, Iowa, the plaintiff, Thomas H. Lansing, was a citizen and resident of Cedar Rapids, Iowa, and F. M. Young was also a citizen and resident of Cedar Rapids, Iowa; that said plaintiffs Thomas H. Lansing and F. M. Young were both personally present in the superior court of Cedar Rapids, Iowa, and both personally directed the commencement of the suit in said superior court by Young & Lansing, Thomas H. Lansing and F. M. Young, and both personally took an active part in the trial of said case, and especially of the defense made to the counterclaim of the defendant, Bever Land Company;

that the plaintiffs Thomas H. Lansing and F. M. Young were personally present during most of the trial in the superior court of the city of Cedar Rapids, Iowa, and both testified in said case; that the said Thomas H. Lansing employed the attorneys who appeared in said cause and tried said case and F. M. Young also personally employed said attorneys or some of them who appeared in said case and contested said counterclaim; that the principal question involved in said trial was the issue joined upon the counterclaim filed by the defendant claiming damage and attorney's fees growing out of matters connected with the leasing and operation and burning of the Clifton Hotel, when the same was occupied by Thomas H. Lansing and F. M. Young, as Young & Lansing, and that the said Thomas H. Lansing advised with the attorneys conducting the defense in said case, and aided and assisted them, and was personally familiar with all of the proceedings had and done in said case; that after the entering of judgment in said case an appeal was taken to the Supreme Court of the state of Iowa by the said Young & Lansing, at the special instance and request of Thomas H. Lansing, and that said appeal was afterwards dismissed by the Supreme Court of the state of Iowa, and said appeal terminated and ended; that said Thomas H. Lansing employed attorneys to prosecute said appeal, and that in all the defense that was made to said counterclaim and in the trial of said case, and in the appeal thereof, said Thomas H. Lansing employed attorneys, aided and assisted in said case, and was personally present and had full knowledge of all that was done therein; and the defendant avers that, by reason of the fact aforesaid, both members of the firm of Young & Lansing, to wit, Thomas H. Lansing and F. M. Young, were represented in said trial, conducted said trial, and are hereby concluded, not only as a firm, but as individuals, by the said judgment in said proceedings. . . . Defendants, further answering, state that by reason of the pleadings, and by reason of the appearance, and by reason of personally attending upon said trial, and testifying therein, and employing lawyers to contest the matters involved in said counterclaim, the said Thomas H. Lansing was, as a member of said firm of Young & Lansing, in court, and no notice was necessary to be served upon him or upon F. M. Young in reference to said counterclaim, and it was not necessary to serve upon plaintiff a notice of the filing of the counterclaim, for the

reason that the said Lansing, as a member of the firm, took issue upon said counterclaim, and testified therein, and employed lawyers to represent the said firm and the said Lansing in said action. . . . And the said sheriff of Linn county, Iowa, has the right to pursue and subject to the payment of said judgment the individual property of the said Thomas H. Lansing.

Each and all of the matters and things charged against F. M. Young and T. H. Lansing might very well have been done in their capacity as agents for the firm of which they were members, and the record nowhere recites that either entered a personal appearance to the suit. It is true that a belated transcript of the judgment, entitled "Young & Lansing v. Bever Land Co.," shows an appearance for the plaintiff. But this is the only record which shows an appearance for plaintiff, and that appearance is for Young & Lansing. A member of a partnership does not become a party to a suit brought against a partnership alone, by employing counsel, giving testimony, or attending and advising counsel upon the trial. And the same rule obtains, we think, where he is named as a party with the partnership, but not served with notice of the suit. In such cases a regular appearance is necessary. *Nixon v. Downey*, 42 Iowa, 78. It is true that one may sometimes be bound by an adjudication by giving testimony in an action to which he is not a party; but this rule has no application here. The question here is: May an execution issue against one not a party to a suit because he took part in the trial thereof? This is something entirely different from the question as to whether or not one may be bound by an adjudication in a suit to which he was not a party named. But, should we assume that by reason of conduct he was bound by the judgment, we have here a denial by the court of any personal judgment against him, although defendant, in its counterclaim, expressly asked for such a judgment.

It may be that the judgment might be amended to show

facts differing from its recitals; but, however that may be,
4. JUDGMENTS : it cannot be amended in a collateral proceed-
amendments. ing. Defendant contends broadly for the
proposition, however, that a judgment against a partnership
alone, in a suit against that entity and no one else, may be en-
forced by execution against the partnership and its property
through the seizure and sale of the property of any in-
dividual member who chose to employ counsel, gave him ad-
vice, or gave testimony upon the trial. We do not think this
is true as a proposition of law. Our Code materially changes
the rules of the common law upon this subject. Under the
Code provisions, as is said in *Anderson v. Wilson*, 142 Iowa,
158:

In construing this section, it must be borne in mind that
at common law the liability of members of a partnership
was joint, and not several, and that all the known partners
were necessary parties defendant, and that no judgment could
be entered against one until it was entered against all. One
purpose of the statute was to make the liability of partners
several as well as joint. Hence the provision that an action
might be brought against the partnership as such, and all,
or some, or none, of the individual members thereof. We
think, therefore, that the true construction of this statute
is that a plaintiff may prosecute his case to judgment against
the partnership alone, or against the partnership and any mem-
ber thereof which he chooses to make a party, and that he
can enforce his judgment against such defendants without
waiting to obtain jurisdiction over other members of the
firm, and without losing his right to proceed in a new action
on the original cause against 'members not made parties.' If
the plaintiff chooses to take his judgment against the partner-
ship alone, a judgment against the partnership alone is all
that he has. His execution can be no broader than his judg-
ment, nor can it run, without some special order, against
any other property than that of the judgment defendant. If
he desires an execution against the property of an individual
member of the firm, he must first obtain a judgment in some
manner. Under the Revision of 1860, he could obtain it on
scire facias proceedings if he had failed to obtain it in the

original proceeding. By section 3468 of the present Code he can obtain it 'by a new action.' We must hold, therefore, that the Anderson judgment against George W. Wilson & Co. is not a judgment against George W. Wilson.

As already stated, the record nowhere disclosed the personal appearance of either F. M. Young or Thos. H. Lansing, and if it did the judgment was not against either in a personal capacity. In these circumstances we need not inquire whether it is permissible in cases against a partnership to have an execution run, on a judgment against a partnership alone, against an individual member served with notice, or one who personally appeared to the suit. We may remark here, however, that if it be proposed to have execution against a member of a partnership not made a party to the proceeding, it should in any event affirmatively appear that his appearance was personal, and to defend against his personal liability rather than in a representative capacity as an agent of the partnership. If served with notice of a claim against him in a personal capacity, he must either defend or have judgment go against him by default, and in such case the record discloses all the facts essential to the establishment of personal liability. But not so where he comes in to the case to defend for the partnership which is the only party to the suit. *Ogle v. Miller*, 128 Iowa, 474. A partnership can act only through one of the partners, and a partner, in fulfilling this duty as an agent of the co-partnership or of his copartner, should not be held to a personal liability, unless it clearly appears that he, in his individual capacity, made himself a party to the suit.

These considerations rule the instant case, and it follows that the ruling on the demurrer was correct, and the order and judgment are *Affirmed*.

C. S. BOICE, Appellee, v. NORA COFFEEN, Executrix of Estate of H. L. Coffeen, Deceased; JOHN D. MULLANEY, Appellant; JAMES H. HENSEN, Appellee, et al.

Mortgages: CONVEYANCE OF PROPERTY: LIABILITY OF GRANTOR AND

1 **GRANTEE.** As between the grantor and grantee of property subject to a mortgage, which the grantee assumed and agreed to pay, the grantee became the principal debtor and the liability of the grantor secondary, while the liability of the property remains the same.

Same. Where property was conveyed subject to mortgage, which was
2 assumed by the prior grantees but finally conveyed with full covenants of warranty, the rights of the original grantees to protection against primary liability for the mortgage debt were not affected by the latter conveyance with full covenants. And where a still later grantee acquired title by a special warranty deed, his rights, as against the mortgagee and a prior grantee who had assumed the mortgage, could be no greater than those of his grantor; and while he might be entitled to equitable relief against his grantor only, it would be without prejudice to pre-existing equities in favor of the mortgagee and a grantee who had assumed the mortgage.

Same: APPEAL: RIGHT TO OBJECT. Where a subsequent grantee was
3 given judgment on a warranty against a prior grantor who had assumed a mortgage on the premises, but conveyed the property with full covenants of warranty, and the prior grantor had appealed, thus threatening the rights of the subsequent grantee under the decree, the plaintiff mortgagee could not object to an appeal by such subsequent grantee, that he might have the merits of his cross-petition tried anew.

Evidence: BEST AND SECONDARY: AVAILABILITY. In a suit to fore-
4 close a mortgage against subsequent grantees who had assumed and agreed to pay the mortgage, the testimony of one defendant, respecting his conveyance of the property, that he conducted the transaction with his grantee personally, that he had no other transaction with him and executed but one deed, was sufficient to show that the deed was in the possession of his grantee, and to permit the introduction of the record in place of the original instrument; and even though introduced in support of the cross-petition of one

of defendants, having been properly received, it was in evidence for all purposes and was available to the plaintiff.

Conveyances: COVENANTS AGAINST INCUMBRANCE: BREACH: MEASURE
5 OF DAMAGES. As a general rule recovery upon a covenant of warranty cannot exceed the consideration received by the warrantor; and it is also a general rule that where a covenant against incumbrances is breached and the warrantee is compelled to pay the same to protect his title, the amount so paid is presumptively the amount of his damage: So that a grantee taking the title with full covenants is entitled, in a suit to foreclose the mortgage, to a judgment against his warrantor for the amount necessary to discharge the same, in the absence of any claim that the amount of the mortgage exceeded the consideration received by his covenantor.

Mortgages: COLLATERAL SECURITY: SURRENDER: EFFECT. Where the
6 grantee of the mortgagor assumed the mortgage, and after giving collateral security for the debt transferred the property to another who also assumed the mortgage, the fact that the mortgagee returned the collateral security to the original grantee was not a matter of which the subsequent grantees could complain; as it did not affect their liability or that of the property as security for the debt.

Same: TRANSFER OF MORTGAGE: COLLUSION: EXTINGUISHMENT OF
7 DEBT. Where a grantee of land, who assumed an existing mortgage, conveyed to another who also assumed the mortgage, and thereafter conveyances were made with full covenants of warranty, the fact that the original grantee may have collusively induced plaintiff to purchase the mortgage note for his protection did not prejudice the rights of a subsequent grantee under full covenants of warranty; and he was not therefore entitled to claim that the transaction constituted payment and discharge of the debt.

Same: ENDORSEMENT WITHOUT RECOURSE. The fact that the assign-
8 ment under the foregoing circumstances was without recourse did not affect the right of the assignee to maintain an action against the grantee who last assumed the mortgage, as the effect of the assignment without recourse was simply to protect the indorser.

Same: COLLATERAL SECURITY: SURRENDER: EFFECT. Collateral secur-
9 ity for a mortgage debt, deposited by a grantee of the premises who assumed the mortgage, becomes secondary to the liability of a subsequent grantee who also assumed the debt; so that its surrender by the mortgagee was not prejudicial to the subsequent grantee.

Conveyances: COVENANTS AGAINST INCUMBRANCES: BREACH: DAMAGES.

10 The rule that a warrantee against incumbrances who has not discharged the incumbrance can only recover nominal damages from his warrantor, while applicable to law actions is not controlling in equity; as a court of equity has power to award substantial damages in advance of actual payment and at the same time provide against double liability of the warrantor by a proper provision in the decree. In the instant case the decree failed to provide against double liability.

Appeal from Winneshiek District Court.—HON. L. E. FELLOWS, Judge.

WEDNESDAY, DECEMBER 11, 1912.

SUIT in equity to foreclose a mortgage on real estate. The original mortgagor was one Steele. Steele conveyed the real estate to Coffeen, who assumed the mortgage. Coffeen conveyed to Mullaney, who also assumed the mortgage. Mullaney conveyed with full covenants of warranty to one Loomis. Loomis conveyed by special warranty deed "by, through, or under" him to Jensen, who is the present owner of the property. Loomis and Steele are not parties. Both Coffeen and Jensen filed separate cross-bills. The cross-bill of the defendant Coffeen was directed against his codefendant Mullaney; that of the defendant Jensen was directed against the plaintiff and against his codefendant Mullaney. There was a decree for the plaintiff, foreclosing the mortgage and charging Mullaney to be personally liable. The decree also awarded relief to Coffeen and Jensen to the extent of holding the liability of Mullaney to be primary as to them. Mullaney appealed. Thereupon Jensen also appealed.—*Modified and Affirmed.*

Frank Sayre, for appellant Mullaney.

E. W. Cutting and E. A. Johnson, for appellant Jensen.

C. A. Boice and E. R. Acres, for appellee.

N. Willett, for defendant Coffeen.

EVANS, J.—The amount of the mortgage in question was originally \$1,000. Its principal was reduced by payment to \$880. The mortgagee was the Winneshiek County Bank. The plaintiff acquired the note and mortgage by assignment and indorsement “without recourse.” The validity of this assignment is assailed by defendant Jensen. We pass that question to a later stage of the discussion; and we will first consider the case as though the plaintiff were the original payee of the note and mortgage. In his cross-bill Coffeen asked that his liability be deemed secondary to that of Mullaney and to that of the mortgaged property. The defendant Jensen asked that the liability of the mortgaged property be deemed secondary to the personal liability both of Mullaney and Coffeen. He also asked relief, as already suggested, on the theory that the plaintiff was not a party in interest, and that the mortgage should be deemed paid.

It will be noticed that all of the defendants appear in the chain of title from Steele to Jensen. Coffeen, as grantee of Steele, assumed to pay the mortgage. Instead of paying it, he conveyed to Mullaney, and Mullaney assumed to pay the mortgage. Loomis, as grantee of Mullaney, did not assume the mortgage. Neither did Jensen as grantee of Loomis. In its essential elements the case would be very simple, were it not that the parties to the appeal have filed seven abstracts and amendments and five briefs.

I. As between Steele, the mortgagor, and Coffeen, his grantee, who assumed the mortgage, Coffeen became the principal debtor; and the liability of Steele to pay the debt be-

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|--|---|
| <p>1. MORTGAGES :
conveyance of
property : li-
ability of
grantor and
grantee.</p> | <p>came secondary. <i>Malanaphey v. Manufacturing Co.</i>, 125 Iowa, 719, and cases there cited. The liability of the mortgaged property remained the same in the hands of said grantee</p> |
|--|---|

as it did in the hands of the first mortgagor. In an equitable sense Coffeen became the mortgagor of his newly acquired property. The existence of the mortgage operated to the protection of Steele on his secondary liability. Upon the con-

veyance of the property by Coffeen to Mullaney and the assumption of the mortgage by Mullaney, then, as between Coffeen and Mullaney, the latter became the principal debtor, and the liability of Coffeen became secondary.

The liability of the mortgaged property was not affected by either conveyance. By the conveyance to Mullaney and his assumption of the mortgage, Mullaney stepped into the shoes of Coffeen. The existence of the mortgage then operated to protect Coffeen upon his secondary liability in like

2. **SAME.** manner as it operated to protect Steele upon his. If this foreclosure had been brought while the mortgaged property remained in Mullaney, there could be no question but that the payee of the note and mortgage could have taken personal judgment against Mullaney, and could have taken foreclosure and special execution against the property. It would be clear, also, that Coffeen, as between himself and Mullaney, would have been entitled to protection as against primary liability. This right was not lost by Mullaney's subsequent conveyance. Jensen holds his title under Mullaney. As against the mortgagee and Coffeen, his rights can rise no higher than Mullaney's. We find him entitled to equitable relief, but only as against Mullaney, his warrantor. Such equitable relief must be awarded to him, but without prejudice to the pre-existing equities of the mortgagee and Coffeen.

These general propositions will suffice as a basis for further discussion of the details of the case as presented by the appeals. The decree entered below awarded the plaintiff a foreclosure of the mortgage and a special execution against the property and a general execution against Mullaney. The decree also awarded judgment in favor of Jensen, with general execution against Mullaney, for the full amount of the incumbrance upon his property. It is made to appear that after the decree was entered the plaintiff sold the mortgaged property under special execution and bid \$800

therefor and took a general execution against Mullaney for the balance of the debt, amounting to over \$300. The defendant Jensen also obtained a general execution under the decree for the full amount of the incumbrance, viz., \$1,091, and levied the same upon the property of Mullaney. Thereupon Mullaney appealed to this court and filed supersedeas bond. Thereupon Jensen appealed also. The plaintiff has moved to dismiss Jensen's appeal, on the ground that he waived his right to appeal by issuing execution.

We may as well say here that we do not think that plaintiff is in a position to raise this question. The defendant Jensen may have been satisfied to abide the decree as entered and to proceed accordingly. But when Mullaney appealed he was threatened with the loss of the only relief which the decree gave him. That he should have determined then to appeal also is not inconsistent with his previous attitude. In the exercise of fair caution he may well have deemed it necessary, after the taking of Mullaney's appeal, that he should appeal, in order that he might obtain a trial *de novo* here upon the merits of his whole case as made by his cross-petition. He could properly assume the possibility that this court might find that he was not entitled to the relief actually granted in the lower court, and yet was entitled to other relief which had been refused. The question herè raised, however, is rendered of no consequence because of the conclusions we reach upon the merits of the case.

We will now proceed to consider more in detail the questions presented by the appeals.

II. We turn first to the appeal of Mullaney. This presents two branches: (1) An appeal from the decree as entered in favor of the plaintiff; (2) an appeal from the decree as entered in favor of Jensen.

We will give our first attention to the first branch. The plaintiff offered in evidence a certified copy of the record of

the deed from Coffeen to Mullaney. This was objected to by Mullaney, on the ground that the evidence was secondary, and that the plaintiff had not sufficiently accounted for the original, under the provisions of section 4630 of the Code. The argument is that the plaintiff should have first testified that he did not have possession or control of the original, as a foundation for the offer of the record in lieu of the original. The trial being had on the equity side, the trial court made no rulings on the admission of evidence. Later Coffeen was examined as a witness in the case. He testified to the circumstances of the execution of the deed in question to Mullaney. The transaction was had with Mullaney personally. Coffeen also testified that it was the only transaction of the kind that he had had with him, and that he executed only one deed. Coffeen thereupon offered in evidence the same certified copy of the record as had been offered by the plaintiff. This testimony was offered in support of Coffeen's cross-bill.

It is quite manifest that if the plaintiff failed in a showing of foundation there was sufficient foundation in the testimony of Coffeen for the introduction of the same certified copy. The original instrument was thereby traced into the hands of Mullaney himself. The original instrument was not one to which the plaintiff, or those under whom he claimed, were parties. On the face of the instrument Mullaney, and no one else, was entitled to possession of it. It is at least doubtful whether such a showing was not a sufficient foundation for the introduction of the record without the testimony of Coffeen. See *Bixby v. Carskaddon*, 55 Iowa, 537. Be that as it may, the certified record was properly introduced under the testimony of Coffeen.

It is argued for appellant Mullaney at this point that the defects of plaintiff's case could not be supplied by the testimony of Coffeen on his cross-bill. But if the evidence was properly in the record on behalf of Coffeen it could not be eliminated, even though the plaintiff had failed to introduce

it at all. Coffeen was entitled to its consideration, and was entitled to equitable relief because thereof. The right of plaintiff at this point was merely incidental to that of Coffeen, and was consonant with it. The evidence could not be *in* for Coffeen and *out* for the plaintiff. The relief sought by Coffeen was that Mullaney should be held primarily liable for the debt to plaintiff. We find no merit, therefore, in this branch of the appeal.

III. In the second branch of Mullaney's appeal, he complains of the measure of damages assumed in behalf of Jensen. It will be noted from what has already been said that Jensen took title under special warranty deed from Loomis. Loomis took title under warranty deed from Mullaney, containing full covenants, including a covenant against incumbrances. The cross-petition of Jensen asked to recover from Mullaney upon his covenant against incumbrances, in case the court should find the mortgage to be a subsisting lien. The trial court allowed the recovery, and fixed the amount thereof at the amount of the mortgage incumbrance. It is urged for Mullaney that this was an erroneous measure of damage, and that the recovery should not have exceeded the amount of consideration received by Mullaney. No evidence was offered on that question by either party. It is therefore urged that only nominal damages could be allowed.

It is the general rule in this state that where there is a failure of title recovery upon a covenant of warranty cannot exceed the consideration received by the warrantor. *Mischke v. Baughn*, 52 Iowa, 528; *Royer v. Foster*, 62 Iowa, 321.

It is also the general rule that where a covenant against incumbrances is breached, and the warrantee is compelled to pay an incumbrance in order to protect his title, the amount so paid is presumptively the measure of damages in such a case. *Newburn v. Lucas*, 126 Iowa, 88; *Knadler v. Sharp*, 36 Iowa, 234.

Whether in such a case the warrantor may show that the

amount claimed exceeds the amount of consideration received by him, we need not determine. The record herein contains no evidence or pleading to that effect. In the case before us Mullaney had assumed to pay the particular incumbrance. Later, by his conveyance to Loomis, he covenanted that he had paid it. All that we hold now is that in such a case as here made, in the absence of any claim that the amount of the incumbrance exceeded the amount of the consideration received, the trial court was justified in adopting the amount necessary to be paid in discharge of the incumbrance as the presumptive measure of damage.

Other objection is urged which goes to the form of the decree. We will consider this in a later paragraph and in another connection.

IV. We turn now to the appeal of Jensen. It is the theory of Jensen that when Coffeen became primarily liable for the debt, Steele *and the mortgaged property* became secondarily liable. This assumption runs through the entire argument. The further assumption runs through the argument that Coffeen continued at all times primarily liable. The argument is not sound at this point, as we have indicated by the general propositions stated at the outset of this opinion. The fact that Coffeen became primarily liable under his conveyance from Steele, and that Steele became thereby secondarily liable only, did not relieve the mortgaged property from its liability to any extent. Steele was not interested to relieve the mortgaged property from its liability. It was to his interest that the liability should remain for his protection. The same argument will apply in a consideration of the relative rights of Coffeen and Mullaney under the conveyance from the former to the latter.

It is made to appear that when Coffeen became the purchaser of the property and assumed the mortgage the payee bank recognized him as a debtor. They received interest from him, and additional security. It is claimed for Jensen

6. MORTGAGES:
collateral security:
surrender: effect.

that the payee afterwards released to Coffeen this security, and that thereby all sureties were released, and that the mortgaged property was thereby released as being only secondarily liable and in the nature of a surety. This argument is not well taken. No one but Steele stood in the relation of surety to Coffeen. As between Coffeen and Mullaney, Coffeen was the surety. If he put up security and received it back again, surely Mullaney was in no position to complain. And this is so whether the security was released before or after Mullaney acquired the property. The liability of the mortgaged property was not in the nature of suretyship. It was as much bound to the payment of the debt in the hands of Mullaney as in the hands of Coffeen or Steele. If Mullaney could not complain of the relinquishment of securities to Coffeen, we see no door open to Jensen to complain, because he holds under Mullaney.

V. The plaintiff, Boice, is the assignee and indorsee of the original payee of the note and mortgage. It is urged by Jensen that he is not a holder in due course, and that his

7. SAME: transfer of mortgage: collusion: extinguishment of debt.

purchase of the note and mortgage was colorable only, and that it was invalid and ineffective to confer any title upon him. It is urged that the plaintiff, in obtaining such assignment, was acting in the interest of Coffeen, and that his pretended purchase was in fact a payment of the debt by Coffeen, and that by such payment the liability of all parties were discharged in fact, and that the plaintiff took a formal assignment for the purpose of defrauding the other defendants in the case.

It is practically conceded that plaintiff's alleged purchase of the note and mortgage was made for the protection of Coffeen. The payee so understood it and assented to it. Coffeen so understood it and signed an accommodation note to the plaintiff, which the plaintiff indorsed and used in the purchase of the note and mortgage in question. If this purchase operated as a fraud upon the other defendants; if it

deprived them, or either of them, of any right which they would otherwise have had, then they are entitled to relief against such purchase.

Granting that the purchase was collusive in the sense that Coffeen and the payee and the plaintiff all agreed to it in advance, and for the purpose of enabling Coffeen to be protected as a debtor who was only secondarily liable, it yet remained for Jensen to show wherein such collusion operated as a fraud upon him. No right of his was violated. His liability was in no manner enlarged by the transfer of the cause of action. The original payee could lawfully have proceeded in precisely the same manner in which the plaintiff proceeded. Coffeen could have obtained the same equitable relief, as against the original payee, which he has obtained in this suit. Of course, if he had actually paid the debt without protecting his equities, he might have put himself at a disadvantage, and such disadvantage might have operated to the benefit of the other defendants. But he vigilantly chose not to pay the debt without guarding his equities. That he should seek to have the papers transferred to a friendly holder was not in itself a fraud upon any one. He was entitled to the relief awarded to him as against any holder. The alleged scheme, therefore, of which Jensen complains renders it plain that the parties thereto intended a *transfer* of the paper, and not a *satisfaction* of it. As between them, therefore, it was not satisfied. As against Jensen, he had no right to demand its satisfaction in such manner. He is therefore in no position to deny the title of the plaintiff, or to assail the same as fraudulent.

VI. As already indicated, the form of the transfer of the paper to the plaintiff was that the note was indorsed to him

“without recourse,” and a further formal written assignment of both note and mortgage was duly executed, acknowledged, and recorded.

8. SAME: indorsement without recourse.

It is urged by Jensen that such assignment carried to the plaintiff nothing but the note and mortgage, and that it

carried to plaintiff no right to sue Mullaney on his undertaking. Jensen concedes the general rule that the transfer of such paper as is here involved carries with it presumptively all securities held therefor by the assignor. He urges, however, that such rule is not applicable in this case, because the note was indorsed "without recourse." Mullaney himself set up no such defense. It would seem, on the face of it, that no interest of Jensen could be subserved by sustaining such a proposition. The theory of his argument, however, is that, if the plaintiff did not acquire the right to recover from Mullaney, then the transfer to the plaintiff of the note and mortgage must have operated to release Mullaney as principal debtor, and that such release would further operate to release all those who were secondarily liable.

Neither the premise nor the argument can be sustained. That the indorsement to plaintiff should be "without recourse" served only to protect the indorser against liability for the debt. There is nothing contrary to be found in *Watson v. Chesire*, 18 Iowa, 206, or *Leach v. Hill*, 106 Iowa, 171, which are relied upon by Jensen in support of his major premise at this point. The assumption of Mullaney was not an independent contract or cause of action in the sense urged. It was incidental to the particular mortgage debt, and was measured by it. It operated, of necessity, to the benefit of the holder of the mortgage, whoever it might be. The right to sue thereon followed the note and mortgage as a part of the security. And, even though we should hold otherwise as to the liability of Mullaney, it would not affect the validity of the mortgage or the liability of the mortgaged property in the hands of Jensen.

It is also urged that Coffeen put up some collateral security which was released by the original payee at the time of the transfer to the plaintiff. The evidence shows that the payee bank did hold some collateral of which no account was taken at the time of the transfer to the plaintiff. The collateral was still in the hands of the bank at the time of the trial. There was

9. SAME: collateral security: surrender: effect.

never any actual release or surrender to Coffeen. It seems to have been forgotten or overlooked at the time of the transfer. Necessarily the payee bank has no further interest in it. Its cashier, testifying as a witness, expressed his willingness to surrender it to Coffeen. Assuming, without holding, that these facts constituted a surrender of security, they furnish no basis of complaint to Jensen.

If plaintiff had successfully asserted a claim to such securities in this suit, it could not operate to the advantage of Jensen or Mullaney or the mortgaged property. The liability of such securities would be co-ordinate with that of Coffeen only, and would therefore be secondary to the liability of Mullaney and of the mortgaged property.

VII. Lastly, we turn again to Mullaney's appeal. It is claimed for Mullaney that, inasmuch as Jensen had not discharged his incumbrance, he was entitled only to nominal

10. CONVEYANCES : covenants against in- cumbrances : breach : dam- ages.	damages, and that he was not entitled to re- cover substantial damages, based upon the amount of incumbrance, or the amount nec- essary to be paid in discharge thereof, until
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after he had paid the same. As a legal proposition, this statement of the rule is usually applied in an action at law. In a suit in equity, however, this rule is not controlling. *Duroe v. Stephens*, 101 Iowa, 358. This is so because a court of equity has larger powers in adapting the remedy to the particular conditions of the case. Provision may therefore be properly made in a decree, for the awarding of damages, even in advance of actual payment, subject always to such proper conditions as shall protect the warrantor against double liability, or any greater liability than the amount which the warrantee must necessarily pay in discharge of the incumbrance.

Complaint is made of the form of the decree, in that it holds Mullaney doubly liable for the amount of the mortgage, first to plaintiff, and, second, to Jensen. The decree is not free from ambiguity. It awarded to plaintiff (1) a special execution against the mortgaged property, (2) a general

execution against Mullaney, and (3) a general execution against Coffeen. It also awarded to Jensen a judgment against Mullaney for the full amount of the incumbrance. It provided, however, that all collections from Mullaney, whether by execution or performance, should operate as a credit upon the judgment in favor of Jensen. It appears from the record of proceedings subsequent to the decree, and before the taking of appeal, that the mortgaged property was sold under special execution for \$800, and that a general execution was issued for the balance in favor of the plaintiff against Mullaney, and that another general execution was issued in favor of Jensen against Mullaney for the full amount of the incumbrance, \$1,091, and that the same was levied upon Mullaney's property.

It is manifest that there ought to be some modification in the decree, or some control of the process issued thereunder. It is manifest that Jensen ought not to be permitted to collect from Mullaney in greater sum than the amount necessary to be paid to redeem his property from the incumbrance. If by judicial sale Jensen's property is relieved from all liability above the amount of the bid therefor, there is no reason why he should be permitted to recover more. Mullaney's liability for the balance is to the plaintiff and not to Jensen in such case.

In view of the complication which has arisen by the use of process subsequent to the decree, we do not feel warranted in undertaking to formulate a decree here, unless the parties can agree thereto. It will be ordered, however, that the decree be modified to this extent, that jurisdiction will be reserved to the district court to make such further orders, in the light of subsequent proceedings under the process of the court, as shall conform to the views herein expressed. This may be done either by a supplemental decree, or by proper order controlling the process to be issued under the decree. In all other respects the decree entered is *Affirmed*.

MARVIN LEE, MINOR; by Mrs. Nellie Lee, his natural Guardian and Next Friend, Appellee, v. PAT HEDERMAN, Appellant and U. S. FIDELITY & GUARANTY Co., Appellee.

Evidence: MATERIALITY: MOTION TO STRIKE. A motion to strike the
1 entire answer of a witness because of immateriality, where a portion of the same was material, and no specific objection was made to the immaterial part, should be overruled.

Same. In the absence of any preliminary showing that a witness had
2 any knowledge of the occupation and character of the party inquired about, objection to the inquiry as to what the witness knew about such persons being a bootlegger was properly sustained as immaterial.

**Intoxicating liquors: INJURY BY INTOXICATED PERSON: DAMAGES: EX-
3 TENT OF PROOF.** Under the statute providing that any child injured in his means of support by an intoxicated person has a right of action against the person who, by selling or giving away liquor, caused the intoxication, it is sufficient to show that the injury was by an intoxicated person regardless of whether it would have been committed by him if sober.

Same: INSTRUCTIONS. In an action of this character, an instruction
4 requiring plaintiff to prove that his injury in the means of his support was in consequence of such intoxication, while casting upon plaintiff a greater burden than the law requires, was not prejudicial to defendant.

Same: LOSS OF SUPPORT: DAMAGES: EVIDENCE. Evidence of the habits
5 of plaintiff's father as to the use of liquor, and that he was a drunkard, while not a defense to an action by a child for loss of means of support by the sale or giving of liquor to him, is competent in determining plaintiff's loss.

*Appeal from Crawford District Court.—HON. Z. A. CHURCH,
Judge.*

WEDNESDAY, DECEMBER 11, 1912.

ACTION for damages resulted in a judgment against defendant, from which he appeals.—*Reversed.*

Connor & Lally, for appellant.

Shaw, Sims & Kuehnle, for appellee.

LADD, J.—The plaintiff is a minor son of Arnold Lee, deceased, and sued by his mother, as next friend, for loss in his means of support. The defendant operated a saloon at Arion, and was alleged in the first count of the petition to have sold or given intoxicating liquors to said Arnold Lee on August 3, 1909, who drank the same, and that said liquors so sold or given caused or contributed to his intoxication, and that while on the way from Arion to Dow City, when so intoxicated, he fell or was thrown from the wagon in which he was riding by reason of the team becoming frightened by the shouting and hallooing of said Lee and one Shaffer, and was thereby killed. In the second count of the petition it is alleged that defendant sold or gave to one Shaffer a pony keg of beer and put a spigot in it; that this was put in Shaffer's wagon; that Lee accompanied Shaffer from Arion to Dow City and that Shaffer became intoxicated on the way from drinking beer from said keg, and when near Arion, and while so intoxicated, by shouting and hallooing, frightened his team, caused it to lunge forward and start to run away, and thereby Lee was thrown from the wagon and killed. The defense interposed was a general denial. Appellant has assigned only sixty-eight errors, thirty-seven of which are argued. Such as seem of sufficient gravity to require it will be considered.

I. The mother of deceased, after testifying that he was twenty-nine years old past, and that she had seen him in the afternoon prior to his death, was asked:

1. EVIDENCE:
materiality:
motion to
strike. "Was he a strong, robust, or very delicate man;" And, over objection as immaterial, answered: "Yes, sir; he was a strong, healthy man, and

[over same objection] he was very pleasant around the house." The defendant moved to strike out the answer because immaterial. The motion was overruled. Defendants argue that the last clause of the answer should have been excluded, but, as the motion was to strike the entire answer, that point was not saved. Defendant's condition was material as bearing on the extent of plaintiff's loss of support, and, as part was material, the motion to strike out the entire answer was rightly overruled.

II. Another witness, George Bell, after testifying that he had resided in Union township, Crawford county, for forty years, and had seen Lee about an hour before he left Arion, and also when he was about half way between Arion and Dow City, and did not regard him as intoxicated, was asked. "What do you know about Mr. Lee being a bootlegger?" An objection as immaterial and incompetent was sustained. Whether what the witness knew would have had any bearing in ascertaining the kind of a man deceased was or his occupation the court had no means of knowing, and, in the absence of any preliminary showing, there was no error in the ruling.

III. Exception is taken to several of the instructions given and refusal of those requested. All of the latter in so far as correctly stating the law were embodied in or negatived by those given. Most of the latter were very short, and, of course, could not for this reason be very comprehensive, but we think the law fairly stated in the charge as a whole except in the instructions hereafter criticized.

3. INTOXICATING LIQUORS: injury by intoxicated person: damages: extent of proof.

In the thirteenth instruction the jury was told that it was only necessary "to show that the accident occurred while the father was in fact intoxicated by the use of intoxicating liquors sold or given to him by defendant or another for him," and that plaintiff was not required to show as a condition to his right of recovery on the first count that "the father would not have met with the accident resulting in

his death had the defendant not sold or given him the liquor in question." The exception thereto is based on an erroneous interpretation of the statute which provides, in substance, that every child who is injured in his means of support "by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person," has a right of action against any person, who by selling or giving contrary to law shall cause intoxication of such person for all damages actually sustained as well as exemplary damages. It is enough that the injury was by an intoxicated person, regardless of whether it would have been committed by him if sober. In other words, if by an intoxicated person, it is not necessary to prove that the injury was in consequence of intoxication. *Bistline v. Ney Bros.*, 134 Iowa, 172.

The nineteenth instruction was inconsistent with the thirteenth, in that it was there laid down that plaintiff must have been "injured in his means of support in consequence of such intoxication." This error, however, was not prejudicial to defendant, for it cast on the plaintiff the additional burden of proving that the injury by an intoxicated person was in consequence of his intoxication. What has been said disposes of the criticisms of the sixteenth instruction, where the jury was told that if the deceased was riding with Shaffer, and Shaffer was intoxicated from drinking intoxicating liquors purchased or procured by him from defendant, and while so intoxicated "did, by shouting and hallooing, frighten, or contribute to frightening of, the team the said Shaffer was driving at the time, and caused the said team to start or jump, and by reason thereof" Lee to be thrown or fall from the wagon and killed, then plaintiff would be entitled to recover, regardless of whether Lee was intoxicated. The criticism is that the court omitted to say that the shouting and hallooing must have been in consequence of Shaffer's intoxication, but this, as seen, was not necessary. If while intoxicated he

4. SAME: instructions.

frightened the team, and thereby caused Lee to fall from the wagon, the defendant became liable, for the statute in express words declares the right of recovery if the injury is by an intoxicated person.

The twenty-first instruction submitted the issue on the theory contended for, however, and in the twenty-second the jury was told, in substance, that, unless injury to means of support was in consequence of intoxication, there could be no recovery. Appellant has no room for complaint of a greater burden being cast on plaintiff than the law exacts. We have called attention to these discrepancies that they may be avoided on another trial.

IV. The court excluded evidence bearing on defendant's habits of economy, and instructed the jury in the fifteenth paragraph of the charge as follows.

5. SAME: loss of support: damages: evidence.

“The habits of the said Arnold Lee as to indulgence in the use of intoxicating liquors, or the fact that he may have become an habitual drunkard, if it had been shown in evidence, would not have been material in determining the plaintiff's right to a verdict or the amount thereof, and you are not permitted to take such matters into consideration, for the reason that it does not follow that he would have continued as such, or that he would have met his death at the time notwithstanding the sale or gift by the defendant to him. In other words, it is no defense in an action of this kind whether the father was in the habit of drinking little or much of intoxicating liquors, or what his earnings were, or how he used them in the support of his wife and child.” An instruction “to take into consideration the habits of deceased as to spending money or saving the same, amount of property he had accumulated and owned at the time of his death, his habits as to spending his money in saloons, and any other fact and circumstance and evidence which will aid in determining just what the plaintiff suffered in his means of support by the death of his father,” was refused. It would seem that no argument is required

to demonstrate that the value of an infant's means of support lost by the death of his father necessarily depends largely on the habits of that father, whether economical, industrious, and sober or the reverse. The means of support to be expected from one in the habit of becoming intoxicated would likely be much less than were he a man of sobriety, and the same may be said of a lazy person as compared with one who is industrious, a thrifty person as against a spendthrift, one who earns good wages as compared with a loafer.

But, according to the instruction given, these matters have no bearing, and the fact of deceased's excessive use of intoxicants or that he may have become a drunkard might not have been considered in determining the amount of the verdict. Of course, as said in the last clause of the instruction, what deceased's habits may have been did not constitute a defense, but these were material in determining the loss in means of support plaintiff suffered through his father's death. *Dunlavey v. Watson*, 38 Iowa, 398; *Uldrich v. Gilmore*, 35 Neb. 288 (53 N. W. 135); Black, Intoxicating Liquor section 324. In *Woolheather v. Risley*, 38 Iowa, 486, followed in *Huff v. Aultman*, 69 Iowa, 71, the rule was laid down that, if a husband had been addicted to drink and failed to support his wife prior to the time defendant had furnished him intoxicating liquors, this could not be considered as bearing on the measure of damages in the loss in means of support claimed by the wife during the period defendant was furnishing him liquors. This was tantamount to saying that because the husband had formerly obtained liquors elsewhere it afforded defendant no justification for selling or giving him liquors during the period alleged, and thereby causing his intoxication, and depriving his wife of the support to which she was entitled. Here the injury was in causing death and all the probabilities of the future were open to inquiry, and, of course, might be estimated only from the life deceased had lived in the past. But for his death, what was

the character and value of the means of support this three year old child would likely have enjoyed? This necessarily depended on the kind of a man he was, and this the jury had the right to take into account in fixing the amount of damages recoverable. There was error in the instruction given, in the refusal to give that requested and in the exclusion of the proffered evidence.—*Reversed.*

JOHN F. LAKE, Trustee of the Estate of Louis E. Dredge,
Bankrupt, v. CLARA J. DREDGE and LOUIS E. DREDGE,
Appellants.

Contracts: RESCISSION: RETURN OF CONSIDERATION. A contract for
1 the settlement of litigation, though procured by fraud, is only void-
able; and can only be rescinded and cancelled by returning, or
offering to return, the consideration received thereunder.

Same: APPEAL: SETTLEMENT OF LITIGATION: EFFECT. On appeal from
2 a judgment cancelling a conveyance, the appellant cannot main-
tain the appeal, where, pending the same the litigation was set-
tled, and where he did not return or offer to return the considera-
tion received, although he was unable to return the same.

Same: SETTLEMENT OF LITIGATION BY REFEREE IN BANKRUPTCY. A set-
3 tlement of litigation made by a trustee in bankruptcy and ap-
proved by the referee, after notice to creditors, was valid and
binding.

Appeal from Page District Court.—HON. A. B. THORNELL,
Judge.

WEDNESDAY, DECEMBER 11, 1912.

THE facts are stated in the opinion. Appeal *Dismissed.*

Earl R. Ferguson and C. R. Barnes, for appellants.

Denver L. Wilson and Thos. W. Keenan, for appellee.

SHERWIN, J.—This is an action in equity, brought by the plaintiff as trustee of the estate of Louis E. Dredge, bankrupt, for the purpose of setting aside the conveyance of a lot to Clara J. Dredge, the wife of the bankrupt, as in fraud of creditors. The original case was tried before the district court of Page county, Judge Thornell presiding, at the regular May, 1911, term of said court, and was taken under advisement, with the agreement among counsel and the court that written arguments might be filed at counsels' convenience. A short time thereafter, but during the same term of court, the plaintiff filed a motion to reopen the case for the purpose of submitting additional evidence. No objection thereto was made by the defendants, and their counsel stipulated for the introduction of the desired exhibits, under certain objections made thereto in the stipulation, and that said evidence might be taken in the absence of the defendants or their counsel. The additional evidence, in the form of exhibits, was not offered during the term of court; but after Judge Thornell had returned to his home in Sidney, Fremont county, said evidence was sent to him with the stipulation to which we have referred, and was considered by him in his final determination of the case. Defendants' counsel were not present before the judge in Sidney; nor is there any showing that they were in any way advised that this additional evidence was first offered after the adjournment of the Page district court, and in vacation. A decree was finally entered, setting aside the transfer, because in fraud of creditors, and the title to the lot was found to be in the plaintiff trustee, subject, however, to a mortgage of \$400, which was on the property at the time Louis E. Dredge purchased it. The defendants appealed in the latter part of August, 1911. In April, 1912, after the abstract had been filed herein, as we understand the record, it was discovered that the exhibits, constituting the additional evidence that was received by Judge Thornell at Sidney, and the stipulation relating thereto, were not in the clerk's office

in Page county, nor could they be found, and there was no record showing that they had ever been filed in said office. Thereupon plaintiff moved for leave to substitute copies of the lost papers, and by agreement of parties a hearing on the motion was had before Judge Thornell at Glenwood, Iowa, and after a hearing, in which defendants resisted the application, substitution was ordered, and from that order the defendants have also appealed.

On the 12th day of August, 1912, the plaintiff and the defendants agreed upon a settlement of this case, and the defendants executed a writing, under oath, in which they acknowledged the receipt of \$200 from the plaintiff, and stated that it was received in full settlement and satisfaction of their demands and contentions in the appeal of this case, and stipulated that the decree of the trial court should stand and be binding on all parties concerned, and that their appeal should be dismissed. Based upon this written acknowledgment and stipulation, the plaintiff thereafter filed a motion to dismiss the appeal in this case. This motion is resisted by the defendants on the principal ground that it was obtained by fraud and false representations. The motion was ordered submitted with the case, and we give it our first consideration, because, if sustained, it is an end of both appeals.

Defendants base their contention that the appeal should not be dismissed on the following grounds: First, because it was obtained by fraud and misrepresentations; and, second, because the motion is not a proper remedy—the same being resisted by the defendants. On the last of these two propositions, it is contended, in effect, that this court is without jurisdiction to determine whether the stipulation of settlement was obtained by fraud. It is said that our jurisdiction is appellate only, and because the resistance to the motion puts in issue the *bona fides* of that transaction we have no power to pass upon the question.

We do not deem it necessary to determine this question,

because of another matter that is without dispute in the record.

1. **CONTRACTS :**
 rescission : re-
 turn of consid-
 eration.

As we have heretofore said, the appellants received \$200 when they signed the stipulation of settlement. This sum they still retain and make no offer to return the same, although they say that they are willing to have it charged to them, if it be determined by this court that the judgment of the district court should be reversed and the property ordered returned to them. The defendants further say they are financially unable to tender its return in any other way, because they have used the money and have no means of replacing it. If it be conceded, for the purposes of this case, that the settlement in question was brought about by the fraud of the appellee, it is still true that the contract of settlement is voidable only, and that it can only be disaffirmed and avoided by returning, or offering to return, the consideration received thereunder. *Fitzgerald v. Paisley*, (Iowa) 119 N. W. Rep. 166; *Ross v. Eggers*, 148 Iowa, 306, and authorities cited therein.

Appellants' claim at this point, that they should not be held to an offer to return the money received by them, be-

2. **SAME: appeal:**
 settlement of
 litigation: ef-
 fect.

cause, if the judgment against them is reversed, the sum received may be credited on the sum that would have to be returned to them, is not sound. They have no right to rescind and at the same time keep the consideration for the settlement, unless it be found that they are entitled to a return of the property taken from them under the judgment of the district court. There are cases holding that an offer to return is not necessary where it appears that as much, at least, as the amount received would be due the party in any event; but this is not a case of that nature. Here, if the judgment should be affirmed, the plaintiff would be entitled to the property awarded him by the decree of the district court, and would lose the money paid as consideration for the settlement, and this because of defendants' admission that they are unable to.

refund. Neither law nor equity will give the defendants such an advantage.

Appellants further contend that the plaintiff, as trustee, had no authority to compromise and settle with the defendants.

3. **SAME:** settle-
ment of litigation by referee
in bankruptcy. It is doubtful whether appellants would have any right to make this objection, were the fact as stated by them. The record, however, shows with sufficient certainty for the purposes of this motion that plaintiff's act has been fully approved by the referee in bankruptcy after due notice to creditors.

We reach the conclusion that the motion to dismiss the appeal should be *Sustained*; and such is the order.

GEORGE F. SAGERS, and others, v. PAULINE SAGERS, Appellant.

Wills: ESTATE GRANTED: RULE IN SHELLEY'S CASE. A will devising property to a son and to the heirs of his own body is not within the rule in Shelley's case, but created a conditional estate in the son, which upon the birth of issue would become absolute; and upon his death without issue the estate would revert to the heirs of the testator. To bring the will within the rule in Shelley's case the limitation to heirs must be by way of remainder, it does not apply to one and his heirs, or to the heirs of his body.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

THURSDAY, DECEMBER 12, 1912.

ACTION to quiet title. There was a judgment for the plaintiffs, and the defendant appeals.—*Affirmed*.

Henderson & Henderson and *Samson & Noble*, for appellant.

Mills & Perry, for appellees.

SHERWIN, C. J.—The plaintiffs alleged that their father, Jacob Sagers, died testate in 1903, seised of the land in controversy, and that by a codicil to his will he devised said land to his son, W. L. Sagers, and to the heirs of his own body; that said W. L. Sagers died testate in 1908, and in his will attempted to devise this real estate to his wife, Pauline Sagers, defendant herein, and that, because of such pretended devise, Pauline Sagers claims to be the owner of the real estate; that W. L. Sagers never begot a child, and consequently neither had nor left “heirs of his own body”; that by reason of his death without issue the land upon his death reverted to the living heirs of the original testator, Jacob Sagers, who are the plaintiffs. The defendant demurred to the petition, on the ground that the facts stated therein did not entitle the plaintiffs to the relief demanded. The demurrer was overruled, and judgment was rendered for the plaintiffs; the defendant electing to stand on her demurrer.

The only question presented for our determination is whether W. L. Sagers took, under the will of his father, an absolute estate in fee simple or only a conditional fee. The appellant contends that the rule in *Shelley's* case applies, and that the will of Jacob Sagers created an estate in fee simple in W. L. Sagers, and that his devise to his wife, Pauline Sagers, the defendant herein, created an estate in fee simple in her. On the other hand, the appellees contend that the devise to W. L. Sagers created in him an estate in fee simple conditional, and, as he never had “heirs of his own body,” that the estate, upon his death, reverted to the heirs, of the testator, Jacob Sagers. We are of opinion that the will in question does not fall within the rule in *Shelley's* case. The devise was to W. L. Sagers and “to the heirs of his own body,” and the rule in *Shelley's* case can only be applied where there is an express or implied life estate with a limitation by way of remainder to the heirs.

In other words, to bring a conveyance or will within that rule, the limitations to heirs must be by way of re-

mainder. The distinction between instruments of that kind and the one before us is well and accurately stated as follows: "A limitation to A. and his heirs created in A. a fee simple, and a limitation to A. and the heirs of his body creates a fee tail. So, under the rule in Shelley's case, a limitation to A. for life, remainder to his heirs, creates a fee simple, and a limitation to A. for life, remainder to the heirs of his body, creates a fee tail. The difference between these two sets of limitations is that in the first there is no express limitation of an estate for life, and in the second there is. Where there is an express limitation for life, A. takes the fee by virtue of the rule in *Shelley's* case; where there is no express limitation of life estate, A. takes the fee also, but not by virtue of the rule in *Shelley's* case. That rule does not apply, unless there is an express or implied life estate with a limitation by way of remainder to the heirs. . . . It is a plain misapprehension of the scope of the rule in *Shelley's* case to assert that it applies to a conveyance to a person and his heirs, or the heirs of his body." Note in 29 L. R. A. (N. S.) 1008; *De Wolf v. Middleton*, 18 R. I. 810 (26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146); *Doyle v. Andis*, 127 Iowa, 36; *Pierson v. Lane*, 60 Iowa, 60; *Kiene v. Gmehle*, 85 Iowa, 312; *Zavitz v. Preston*, 96 Iowa, 52; *Wescott v. Binford*, 104 Iowa, 645. See note in 7 Am. St. Rep. 428; *Miller v. Mowers*, 227 Ill. 392 (81 N. E. 420); *Johnson v. Buck*, 220 Ill. 227 (77 N. E. 163); *Berry v. Williamson*, 11 B. Mon. (Ky.) 245; 25 Am. & Eng. Enc. Law, 644.

In *Wild's* case, 6 Reports, 17, 10 English Ruling Cases, 773, it was held that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail. The reason assigned for the holding is that the intent of the devisor is manifest and certain that the children (or issue) should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that

was not the devisor's intent, for the gift is immediate; therefore such words shall be taken as words of limitation.

In *Pierson v. Lane*, 60 Iowa, 60, cited above, the conveyance was to Minerva Pierson and "the heirs of her body begotten by her present husband. . . . To have and to hold the above granted and bargained premises. . . . unto the said Minerva Pierson and the heirs of her body begotten by said husband." And it was there held that the rule in *Shelley's* case did not apply, and that the grant created a conditional fee under the common law. Under the common law, before the enactment of the statute *de donis* (13 Edw. I, chapter 1), it was held that such a conveyance created a conditional fee, because, if the grantee died without having the specified heirs, the land reverted to the grantor. As soon, however, as the specified heirs were born, the estate became absolute, and the grantee could alienate it. This rule was adopted by the court in *Pierson v. Lane*, and it was held that, as Minerva Pierson had the requisite heirs, she took an absolute fee, and could alienate the land. In *Kepler v. Larson*, 131 Iowa, 438, we distinctly said that conditional fees, as they existed before the enactment of the statute *de donis*, prevailed in this state.

In 4 Kent's Commentaries a conditional fee is thus defined: "A conditional fee is one which restrains the fee to some particular heirs, exclusive of others, as to the heirs of a man's body, or to the heirs male of his body. This was at the common law construed to be a fee simple, on condition that the grantee had the heirs prescribed. If the grantee died without such issue, the lands reverted to the grantor. But if he had the specified issue the condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alien the land and bar not only his own issue, but the possibility of a reverter. By having issue, the condition was performed for three purposes: To alien, to forfeit, and to charge. Even before issue had, the tenant of the fee simple conditional might by feoffment have bound

the issue of his body. But still there existed the possibility of a reverter in the donor. After issue born, the tenant could also bar the donor and his heirs of that possibility of a reversion; but the course of descent was not altered by having issue. The common law provided the *formedon* in reverter, as the remedial writ for the grantor and his heirs, after the determination of the gift of the conditional fee by the failure of heirs. Before the statute *de donis*, a fee on condition that the donee had issue of his body was in fact a fee tail, and the limitation was not effaced by the birth of issue. If the donee died without having aliened in fee, and without leaving issue, general or special, according to the extent of the gift, the land reverted again to the donor. But the tenant, after the birth of issue, could and did alien in fee and this alleged breach of the condition of the grant was the occasion of the Statute of Westminster II, 13 Edw. I, chapter 1, commonly called the statute *de donis*, which recited the evasion of the condition of the gift by this subtle construction, and consequent alienation, going to defeat the intention of the donor."

Blackstone defines a conditional fee as follows: "A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, . . . as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs, or of heirs male of his body, in exclusion both of collaterals and lineal females also. It was called a conditional fee by reason of the condition expressed or implied in the donation of it, that, if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land revert to its ancient proprietor."

In *Croxall v. Sherrerd* 5, Wall. 268 (18 L. Ed. 572), it was said: "Estates tail, under the statute *de donis*, were, before the passage of the statute, known in the common law as conditional fees. Like estates tail, they were limited to

particular heirs to the exclusion of others. The condition was that if the donee died without leaving such heirs as were specified the estate should revert to the grantor. According to the common law, upon the birth of such issue the estate became absolute for three purposes. (1) The donee could alien, and thus bar his own issue and the reversioner. (2) He could forfeit the estate in fee simple for treason. Before he could only forfeit his life estate. (3) He could charge it with incumbrances. He might also alien before issue born; but in that case the effect of the alienation was only to exclude the lord, during the life of the tenant, and that of his issue, if such issue were subsequently born while if the alienation were after the birth its effect was complete and vested in the grantee a fee-simple estate. *Willion v. Berkeley*, 1 Plowd. 241. In this state of the law it became usual for the donee, as soon as the condition was fulfilled by the birth of issue, to alien and afterwards to repurchase the land. This gave him a fee simple absolute for all purposes. The heir was thus completely in the power of the ancestor, and the bounty of the donor was liable to be defeated by the birth of the issue, for whom it was his object to provide. To prevent such results, and to enable the great families to transmit in perpetuity the possession of their estates to their posterity, the statute *de donis* of 13 Edw. I, known as the Statute of Westminster II, was passed."

As we have said, the conditional fee of the common law, as it existed before the enactment of the statute *de donis*, is a part of the law of this state; and this being true, on the death of W. L. Sagers without the particular heirs specified in the will, the estate reverted to the testator's heirs, the plaintiffs herein. The judgment of the district court must therefore be *Affirmed*.

WEAVER, J., dissenting.

A. B. KELLEY, Executor of the Estate of James D. Kelley, Deceased, Appellant, v. DRAINAGE DISTRICT No. 60 IN GREENE COUNTY, IOWA, and THE BOARD OF SUPERVISORS OF GREENE COUNTY, IOWA.

Drainage: ESTABLISHMENT OF DISTRICT: DESCRIPTION OF TERRITORY.

- 1 The petition for the establishment of a drainage district should describe the land to be included by metes and bounds, or otherwise, so as to convey an intelligent description of such lands. Where however, the petition adopted the description contained in the petition for the establishment of another district covering the same territory, so that the engineer was able to ascertain the lands intended, the description was not so defective as to render subsequent proceedings void.

Same: TERRITORY INCLUDED. A new drainage district may be established

- 2 covering precisely the same territory as one previously organized, for the purpose of enlarging the outlet and making the system more efficient.

Same: REPORT OF ENGINEER: SURVEY. Where the engineer in charge of

- 3 the establishment of a new drainage district, embracing the same territory as one previously established, had his field notes of the original survey and the plat then returned with his report, a new survey was not necessary, and a report accompanied by the plat of the previous survey, with lines clearly indicating the route of the new drains, though irregular, was sufficient.

Same: PLAN OF IMPROVEMENT: REPORT OF ENGINEER. In the establish-

- 4 ment of a drainage district the supervisors are limited to the adoption of the plan recommended by the engineer as practicable and likely to be efficient, and before ordering the improvement it must conform substantially with the plan as recommended.

Same: REPORT OF ENGINEER: OMISSION OF DESCRIPTIONS. The fact

- 5 that the report of the engineer, in the formation of a new district embracing an old one, omitted a description of the several tracts included and the names of the owners, was not a jurisdictional defect; and as appellant appeared in resistance to the establishment of the district and to challenge the assessments, the omissions were not prejudicial.

Same: NOTICE OF HEARING: SERVICE. Where the board in fact ap-
6 proved the plan of drainage recommended by the engineer, the fact
that notice of the hearing on the petition and claims for damages was
served prior to the adoption of the plan was not fatal to the pro-
ceedings.

Same: ASSESSMENT: WAIVER OF REMEDIES. Failure of a landowner,
7 who was made a party to the proceedings for the establishment of a
drainage district, to appeal from the action of the board in making
an assessment is a waiver of all other remedies.

Same: BENEFITS: ASSESSMENTS: EVIDENCE. The establishment of a
8 drainage district involves a determination of the fact that all lands
embraced therein will be benefitted to some extent, and this question
will not be reconsidered in levying the assessments; and evidence of
no benefit is incompetent on the question of the excessive character
of the assessments. In this case the new drains furnished an ad-
ditional outlet and were of benefit to all lands tributary thereto, even
though they did not touch some of the lands.

Same: CLASSIFICATION AND ASSESSMENT OF LANDS. Slight variance from
9 the method prescribed for the classification and assessment of lands
will be treated as immaterial, unless prejudice results.

Appeal from Green District Court.—HON. M. E. HUTCHIN-
SON, Judge.

THURSDAY, DECEMBER 12, 1912.

APPEAL by the executors of the estate of James D. Kelley, deceased, from assessments for drainage improvements resulted in the approval of such assessments as made by the board of supervisors. The executor appeals.—*Affirmed.*

W. W. Turner, and J. A. Henderson, for appellant.

Wilson & Albert, for appellees.

LADD, J.—Drainage district No. 3, containing twenty-four forty-acre tracts situated in sections 3, 4, 9 and 10, in township 83 north, of range 29 west, of the 5th P. M., in Greene

county, Iowa, was established, and the improvement contemplated was completed in 1906. On May 26, 1909, the members of the town council of Grand Junction and many others, after calling attention to the insufficiency of the improvement, and declaring that it did not carry off the water or adequately drain a part of Grand Junction, prayed the board of supervisors of Greene county to give the matter consideration. Thereupon the board directed the engineer who had planned said improvements to investigate, which he did, and in his report recommended that additional tile be laid to carry off the surplus water. Later Geo. Rice and others filed a petition reciting that the improvement in district No. 3 had proved insufficient to drain the lands necessarily tributary, and requested the board for the establishment of a new drainage district;

Covering and including the said district No. three (3) and for the purpose of giving a description of the land in said district, and the character thereof, these petitioners make all the allegations in the original petition filed for the establishment of said district No. three (3) a part of this petition by reference, with the same effect as if copied and set out herein, and these petitioners ask that a new tile ditch or drain be laid or constructed in said district, commencing at the line of the present tile drain therein, and connecting with the same at a point at or about twenty-five rods south of the center of section four (4), township eighty-three (83) north, of range twenty-nine (29) west of the 5th P. M., and extending thence in a general northeasterly direction, and following approximately the course of the tile drain now in and constructed under the proceedings in said district number three (3), at an average distance of about one hundred (100) feet north and west of the same across the east half of said section, and also across the northwest forty (40) acres of section three (3) in said township and range, and crossing the right of way of the Chicago & Northwestern Railway Company's right of way at a point about thirty-five rods east of the west line of said section three, and terminating and outletting in an open drain on the public highway immediately north of the point where the same is asked to cross said railway

right of way, the same to follow in general and approximately the course of the natural drainage over the land to be crossed thereby, as may be found most practicable by the engineer in charge, also to connect at the upper end thereof with such branch or branches of the said improvement now in and forming a part of said district number three as may by such engineer be found most practicable for the bettering of the outlet of said drainage district number three and rendering the same sufficient to protect and drain in lands therein and tributary to said improvement.

This petition was accompanied by bond in proper form and duly approved, and Geo. M. Thompson was appointed engineer to act on the same. On October 22, 1909, the engineer filed his report, reciting therein that he had inspected the land to be affected by the proposed improvement, and that, as he had made the survey and superintended the construction of the improvements in drainage district No. 3, was in possession of the field book and plat of said district, and other matters not necessary to be repeated, recommended that a drain be constructed substantially as described in the petition. A plat of drainage district No. 3 was made a part of the report, and "the line of the new drains that I recommended to be constructed is shown by a line of red dots, and run parallel to sections 10, 4, and 5A of drainage District No. three (3) as will be seen from an examination of the plat."

Then follows a specific description of four sections of the improvement, one being an open ditch and the others of 14, 18, and 20 inch tile, all at the estimated expense of \$2,515.44. Were a plat before us, we might be able to understand the location of the tile drain and ditch as recommended, but we have nothing but a photograph of the plat, so dim as to be of no service whatever, save as indicating that much of the land has been platted into town lots, as disclosed by the report of the commissioners who assessed the expenses, including all costs against the several parcels of land. We

infer from the statements of counsel that the drainage district is bounded on the north approximately by the Chicago & Northwestern Railroad and on the west by the Minneapolis & St. Louis Railroad, these crossing at right angles in the town of Grand Junction. "The east boundary of the district is approximately the east line of section 4 and 9, except near the outlet two forties of section '3' are included. The south boundary of the east part of the district is approximately the center line of section 9, and the south boundary of the west part of the district is approximately Elizabeth street in South Grand Junction. The main line of district No. 3 started at the northeast corner of the district at about the Chicago & Northwestern right of way, and deflected to the west, and then approximately straight south past the center line of section 9 across the lands of Kelley and Scott, and to the land of Rebecca K. Herron. The appellant herein owns certain town lots in South Grand Junction and certain lots in the south of the district. Commencing at the aforesaid main line of the ditch on the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 4," the drain "ran to the west and southwest and ended at the corporation . . . line which is the center line of said section." This last drain "was connected with an old tile drain in South Grand Junction." The engineer reported that this drain was insufficient to carry off the water from "where the town branch connected into the main," and he recommended that a tile drain entirely independent of drain No. 3 be constructed from the same outlet and parallel therewith to the junction "where the town branch came in and thence past the town branch and to the end at the east line of the corporation of the town approximately to where No. three (3) ends." No description of the several tracts of land contained in the district nor the names of the owners thereof as shown by the transfer books accompanied this report. On the same day the recommendation of the engineer was approved, and the county auditor directed to serve the necessary notice, and it was resolved "that said new drainage dis-

trict and enlargement of outlet of drainage district No. three (3) for the purpose of convenience and description be known and named as drainage district No. (60) sixty." Subsequently on January 3, 1910, the board of supervisors adopted a resolution covering all requirements, including those of section 1989-a1 of the Code Supplement, and thereafter commissioners were appointed to equitably apportion the costs and expenses, including the cost of construction, fees, and damages among the several tracts of land, and make report, which they did, and the improvement was constructed in pursuance of proceedings of which there is no complaint.

Appellants and others interposed objections to the establishment of drainage district No. 60, but, as no appeal was taken from the findings of the board of supervisors overruling these, only questions affecting the authority of the board to act and bearing on the assessments as made from which appeal was taken can be considered.

I. Appellant challenges the jurisdiction of the board of supervisors to entertain the application for and to order the improvement, for that (1) the law, as is said, does not authorize the establishment of a new drainage district of the same body of land which already constitutes a drainage district previously organized; (2) the petition was insufficient in not describing the district definitely; (3) the plan of the engineer had not been approved by the board when notice of the hearing of the petition and claims for damages was served; and (4) the report of the engineer was not in compliance with the statute.

The petition for the establishment of the district and the improvement merely referred to and adopted the descriptions contained in that for the establishment of drainage district

No. 3 of Greene county, and it is said this

1. DRAINAGE:
establishment
of district:
description of
territory.

was not in compliance with section 1989-a2.

All exacted by that statute is that the body
or district of land to be included shall be

"described by metes and bounds, or otherwise so as to con-

vey an intelligent description of such lands." The method adopted is not to be commended, but it did point out a distinct body of land formerly set apart as a drainage district, and precisely where a specific description of the several tracts of land included therein might be definitely ascertained at little inconvenience. The board of supervisors might well have required the petitioners to specify directly the lands proposed to be included, but, though the description was objected to, this was not done, and we are not inclined to say that a description which when followed up will enable an engineer to ascertain precisely the lands intended is so defective as to render all subsequent proceedings illegal and void for want of jurisdiction. See *In re Drainage District No. 3, Hardin County*, 146 Iowa, 564.

II. Counsel contend, however, that a drainage district may not be established covering precisely the same territory as one previously organized. Nothing in the
2. SAME: territory included. drainage laws expressly prohibits this, and we think it specifically authorized by section 1989-a25 of the Code Supplement, which reads:

If any levee, drainage district or improvement heretofore established either by legal proceedings or by private parties, or which may hereafter be established shall prove insufficient to protect or drain all of the lands necessarily tributary thereto, the board of supervisors, upon petition therefor as for the establishment of an original levee or drainage district, shall have the power and authority to establish a new levee or drainage district covering and including such old district or improvement, together with any additional lands deemed necessary; and whenever a new district shall be established as contemplated in this section and the new improvement shall extend into or along the former improvement, the commissioners of classification and benefits shall take into consideration the value of such old improvement in the construction of the new improvement and credit the same to the parties owning the old improvement as their interests may appear.

The suggestion is that this is applicable only to the establishment of a district with territory additional to that of the existing district. The language employed will not bear this construction. "Any additional lands deemed necessary" may be included, but the new district is authorized whenever the existing drains "shall prove insufficient to protect or drain lands necessarily tributary thereto," and all these may be within the existing district. We are of opinion that the proceedings in controversy were authorized by the statute quoted.

It does not follow, however, that relief by way of supplying an adequate outlet for the existing district was not available under section 1989-a21 of the Code Supplement, which declares that, "whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby." Whether such enlargement of the outlet be effected by widening and deepening the existing ditch or excavating another parallel with it, or whether this be done by removing tile and replacing it by that of larger size, or by laying another tile drain parallel with that already laid, can make no difference, for, in either event, the result is the enlargement of the outlet which is here authorized, and the costs of which are to be assessed as subsequently directed in the same section. It is enough for the purposes of this case, however, that the proceedings were authorized by and in pursuance of the statute first quoted.

III. The report of the engineer on which the improve-

ment was ordered by the board of supervisors was somewhat irregular. While he described the tile drains and ditch

to be constructed with sufficient accuracy, the
3. **SAME: report of engineer: survey.** elevations "of all lakes, ponds and deep depressions" in the district were not stated,

nor did he report "the description of each tract of land therein and the names of the owners thereof as shown by the transfer books in the auditor's office." But his report discloses that he was the engineer who made the report for the improvements by drainage district No. 3, that he still had the field notes of that survey and the plat then returned with his report. Being in possession of the very information required, there was no occasion for a resurvey of the district. Moreover, the purpose of forming the new district was the construction of tile drains and a ditch which would relieve the existing drainage system by affording an additional outlet, and, for this reason, a restatement of the elevations contained in the former report would have been of no advantage. The plat accompanying the report when drainage district No. 3 was organized with the location of the proposed additional drains indicated by red dots, clearly identifying the route, was returned with the report. It was necessary in order to render his report intelligible to indicate the relation of the new drain with that previously constructed, and, though somewhat informal, it furnished the board of supervisors with the necessary data in these respects to enable it to proceed with the performance of its duties in the matter of establishing the district and ordering the improvement. *Lyon v. Board*, 155 Iowa, 367. See section 1989-a16, Code Supp.

As insisted by appellant, the board of supervisors is limited to the adoption of a plan recommended by an engineer as practicable, desirable, and likely to be efficient for the

purpose intended, and, before ordering an
4. **SAME: plan of improvement: report of engineer.** improvement, it must conform substantially with the plan recommended by an expert in

such matters. *Zinser v. Board*, 137 Iowa, 660; *In re Nishnabotna River Improvement District No. 2*, 145 Iowa, 130;

Hartshorn v. Wright Co., 142 Iowa, 72; *Pritchard v. Board*, 150 Iowa, 565; *Lyon v. Board*, 155 Iowa, 367; *Shaw v. Nelson*, 150, Iowa, 559. What was said in *Laurence v. Board*, 151 Iowa, 182, was not inconsistent with this conclusion, for there the engineer had recommended a ditch of a certain width and depth, on the theory that action of the water would widen and deepen it so as to render it adequate, and it was held competent for the board of supervisors to order the ditch excavated of sufficient width and depth therefor in the first instance. But no such question is involved here. The drains were ordered of capacity and at locations precisely as recommended.

The report entirely omitted the description of each tract included in the district and the names of the owners as exacted by section 1989-a2. The design of this requirement is to ren-

5. SAME: report of engineer: omission of descriptions. der certain the several tracts included in the district and furnish the names of the owners for the purposes of serving notice on them as prescribed in section 3, chapter 118, Acts 33d General Assembly. Probably the circumstance that the engineer never woke up to the fact that a new district was being formed explains the omission to include these matters in his report. The several tracts had been assessed for the construction of the former improvement, and he may have relied on the information to be derived from the proceedings in the establishment of drainage district No. 3, though there may have been transfer since. Be this as it may, we are not inclined to regard this feature of the report as jurisdictional, and, as appellant appeared both in resistance to the establishment of the district and to challenge the assessments, these omissions were entirely without prejudice.

6. SAME: notice of hearing: service. The objection with reference to the service of notice of the hearing of the petition and claims for damages prior to the adoption of the plan recommended by the engineer was disposed of adversely to appellant in *County Drains v. Long*, 151 Iowa, 47.

We have reviewed the proceedings leading up to the order directing the improvement in controversy in response to argument of counsel, and in doing so have construed the drainage statutes somewhat liberally, as required by

7. **SAME: assessments: waiver of remedies.** section 1989-a46 of the Code Supplement, but as notice was given as required, and appellant appeared at the hearing of the petition, and did not appeal from the order of the board establishing the district directing that the improvement be made, our decision might well have rested on the provisions of that section declaring that:

The collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural water course provided for in this act, but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law unless they were appealed from. But if, upon appeal, the court shall deem it just and proper to release any person or modify his assessment or liability, it shall in no manner affect the rights or liability of any person other than the appellant; and the failure to appeal from the order of the board of supervisors of which complaint is made shall be a waiver of any illegality in the proceedings and the remedies provided for in this act shall exclude all other remedies.

This is tantamount to saying that the only remedy of an owner of lands contained therein made a party to the hearing on the petition for the establishment of the drainage district is by appeal to the district court, and a failure to avail himself of that remedy is waiver of all other remedies. It necessarily follows that the defects to which attention has been directed were waived by appellant, and cannot be considered in passing on this appeal from the assessments levied on the several parcels of land belonging to the estate.

The board of supervisors confirmed the assessments as

recommended by the commissioners appointed to make "an equitable apportionment of the costs, expenses, costs of con-

8. SAME: benefits: assessments: evidence.

struction, fees and damages assessed for the construction" of the improvement. The appeal is from this order, and the only bearing of much of the evidence was in tending to show that the improvement was of no benefit to some or all of the lots or parcels of land of the estate. Section 1989-a12 of the Code Supplement declares that "in no case shall it be competent to show that lands assessed would not be benefited by the improvement." This is for the reason that by including such lands in the district when established the board of supervisors necessarily found that such lands would be benefited by the improvement, and the matter will not be reconsidered in levying the assessments. For other grounds, see *Allerton v. Monona County*, 111 Iowa, 560; *Ross v. Board*, 128 Iowa, 427. The evidence in so far as it tended to show that no benefit would be or was derived from the improvement was incompetent, and it furnished little or no aid in the determination of whether the assessments were excessive. See *Camp v. City of Davenport*, 151 Iowa, 33. The new drains did relieve the main drain in the system as previously constructed by furnishing an additional outlet, and in this respect was of some benefit to all the lands tributary thereto, even though not as near to some of them as the existing main. Nor was the circumstance that it did not touch such lands a valid objection to the assessments, though appropriate for consideration in ascertaining the benefits thereto. Section 1989-a13, Code Supplement.

Slight variances from the method prescribed for the classification and assessment of lands, unless

9. SAME: classification and assessment of lands.

prejudice result, are immaterial. *Hampe v. Hamilton County*, 146 Iowa, 280; *In re Seattle*, 54 Wash. 297 (103 Pac. 20).

What should be taken into account in doing so was pointed out in *Zinser v. Board*, 137 Iowa, 660, and even

though assessments exceeding benefits might be authorized by the Legislature, we are not inclined to the view that such was its intention in enacting the drainage laws of this state. *In re Jenison*, 145 Iowa, 215; *Pabbeldt v. Hamilton County*, 144 Iowa, 476. These decisions, though not considering the point, proceed on the theory that the statutes should be so construed. No personal liability is imposed, as in the statute construed in *Farwell v. Brick Mfg. Co.*, 97 Iowa, 286. See 25 Am. & Eng. Ency. of Law (2d Ed.) 1172; 14 Cyc. 1061; *Rolph v. City of Fargo*, 7 N. D. 640 (76 N. W. 242, 42 L. R. A. 646). But this question is not raised by the record before us. The assessments against the town lots range from a few cents up to \$13.05, and, conceding the improvement to be of some benefit to each lot, it is impossible to deduce from this record that such amount is less and how much less than that assessed. Moreover, an examination of the record as a whole has convinced us that the improvement will prove of substantial benefit to the several lots and much more to the forty-acre tracts than the amounts levied against them. No useful purpose will be served by a review of the evidence, and for this reason we are content in announcing our conclusion without more particularly specifying the reasons which have led thereto.

The judgment of the district court is *Affirmed*.

ALICE C. BAILEY as Executrix of the Will of William H. Bailey, Deceased, Appellee, v. THE CITY OF DES MOINES, Appellant.

Municipal corporations: SPECIAL ASSESSMENTS: LIMITATION OF
1 AMOUNT: ESTOPPEL. Where a city council refused the offer of petitioners for a street improvement to waive the statutory limitation of the amount of a special assessment, and proceeded to make the improvement on its own motion and regardless of the petition or consent of the property owners, the rejected offer could not be relied on as an estoppel against the property owners to insist on the statutory limitation of the amount of the assessment.

Same: PAROL EVIDENCE: IMPEACHMENT OF RECORD. A city council

2 cannot impeach its own record that a street improvement was ordered by the council on its own motion, without reference to any consent or petition of property owners, by parol evidence that the improvement was petitioned for and the petition was considered, but that it was customary, where three-fourths of the council were in favor of the improvement, to make the record show that the resolution was passed on the council's own motion for the purpose of avoiding possible defects in the petition.

Same: SPECIAL ASSESSMENTS: ESTOPPEL. The fact that the owner of

3 property subject to special assessment was the city attorney and approved the form of contract for the improvement, would not estop his executrix from objecting to the assessment of his property on the ground that it exceeded the statutory limitation.

Same: EXCESSIVE ASSESSMENT: BURDEN OF PROOF. Where a city at-

4 tempts to assess property for a street improvement in excess of the statutory limitation, it has the burden of showing some ground upon which the limitation can be avoided; and a property owner is not chargeable with bad faith in resisting the excessive assessment.

Same: PAVING: STATUTE: CONSTRUCTION. The term paving as used

5 in the statute authorizing a city to improve a street by curbing, guttering, paving, etc., contemplates that the work shall all be done as one improvement, where the street has not already been curbed and guttered; and it cannot treat the work as separate and independent items, making them the subject of contract and assessment to the extent of twenty-five per cent of the value of the abutting property in each instance.

*Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.*

THURSDAY, DECEMBER 12, 1912.

THE opinion states the case.—*Affirmed.*

*Robert O. Brennan, H. W. Byers and E. C. Carlson, for
appellant.*

Stipp & Perry, for appellee.

WEAVER, J.—Certain special assessments having been levied upon city lots owned by William H. Bailey, since deceased, for expenses incurred in the paving, guttering, and curbing of a street known as Prospect boulevard, the owner appealed therefrom to the district court. Upon a hearing of the evidence the district court modified and reduced said assessments in the manner hereinafter mentioned, and the city appeals from said decision to this court.

The material facts may be stated as follows: Mr. Bailey became purchaser of the lots by contract in June, 1909. Prior to that time in the year 1907 or 1908, the city council had ordered the construction of a combined curb and gutter in front of the property, but the work done under this order had been rejected. A petition in which Mr. Bailey's grantors joined had also been presented to the council for paving the street. In this petition the signers waived, or offered to waive, the benefit of the statute which limits the liability of adjacent property to special assessment for any street improvement to 25 per cent. of its actual value. Thereafter, in April, 1909, the council, after the usual resolution of necessity, ordered the paving of said street, declaring in the resolution therefor that such order was made "without the petition of property owners." The work of paving thus ordered and the final construction of the curb and gutter were done practically at the same time, but under separate contracts. The schedule of assessments for the curbing was presented to the council on September 15, 1909, and five days later a like schedule for the cost of the pavement was also presented. Further proceedings for the consideration of objections and protests against said proposed assessments were carried along in parallel lines, and they were finally approved and levied at or near the same time. Mr. Bailey appeared at the hearings, and protested against the assessments on several grounds, but two of which are involved in this appeal, and to these alone do we give attention. These objections are (1) that the construction of the pavement, curb, and gutter constitute but

a single improvement, and that but one special assessment therefor can rightfully be levied upon the adjacent property for the expense so incurred; and (2) that the assessments levied by the council exceed in amount the one-fourth of the actual value of that part of the lots in question which is legally chargeable with such burden.

The council having overruled these objections, Mr. Bailey appealed to the district court, which, on hearing the evidence, held the objections well taken, and reduced the assessment for the combined improvement to the sum of \$1,200, which it found to be the one-fourth of the actual value of the property. It is from this decision that the city has appealed.

I. The first question argued by counsel is whether the appellee, as the heir or devisee or executrix of Mr. Bailey's estate, is estopped to claim the benefit of the above-cited

statute. It is the contention of counsel that

1. MUNICIPAL
CORPORATIONS:
special assess-
ments: limita-
tion of
amount; es-
toppel.

as Mr. Bailey's grantors had signed a petition waiving the benefit of the statutory limitation of the amount of special assessment, and as the proceedings for the construction of the

pavement were already in progress when Bailey entered into the contract of purchase, he took the property subject to such waiver, and that neither he nor his heirs or representatives can be heard now to claim the benefit of the limitation. Under our statute the work of street improvement at the expense of adjacent property may be initiated in either of two ways: Upon the petition of the owners of a majority of the lineal front feet of the adjoining property, in which case a majority of the council is sufficient to pass such a resolution, or upon the council's own motion which authority may be exercised only when three-fourths of all the members of the council unite in adopting the proper resolution. Code, section 793. When the final order for such improvements is entered, it is required that the record shall be made to "show whether the improvement was petitioned for or made on the motion of

the council." Code, section 811. The authority to levy special assessment for such improvements is subject to the following restriction: "Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of the levy, and the last preceding assessment roll shall be taken as *prima facie* evidence of such value." Code Supp. 1907, section 792a. So far as the city records are concerned, they do not disclose that the petition to which we have referred ever received any consideration at the hands of the council and still less do they show its acceptance or approval. On the contrary, when, in obedience to the statute, the record is made to show upon whose initiation the improvement was undertaken, it is there declared it was "not upon petition of the property owners." For present purposes, it may be conceded that a property owner who petitions for an improvement, and as inducement to favorable action thereon offers to waive the benefit of the statutory restriction, cannot be heard to repudiate his undertaking after his petition has been granted, and the improvement for which he has asked has been made; but it seems to us no less clear that, where the council does not accept the offer of the petitioner, and thereafter proceeds professedly and expressly upon its own motion to exercise its statutory power to make an improvement of that nature without reference to the request or consent of the persons interested, there is no principle of law or equity which will entitle the city to set up the offer or waiver contained in the rejected petition as an estoppel against the property owner's assertion of his statutory rights.

Extrinsic evidence was offered on behalf of the city that it was the custom of the council when an improvement was petitioned for, and three-fourths of the members were in favor thereof, to make the record show that the resolution was passed upon the council's own motion, and that this was done to avoid any trouble or complication which might arise over any after-discovered defect in the petition, although as a matter of fact

2. SAME: parol evidence: impeachment of record.

such petitions were considered and accorded influence in determining that question. In our judgment the trial court correctly refused to regard this testimony as either competent or material. The substance of such showing would be an impeachment by the city of its own records by parol evidence that, while such record expressly states that the action was taken upon the council's own motion, it was in fact taken upon the petition of the property owners. This, upon familiar principles, it cannot be allowed to do. It is true that persons who have petitioned for street improvements have quite frequently been held estopped to contest the assessments thus resulting because of irregularity in the preliminary proceedings, and it is not unreasonable to suppose that the existence of this rule was one reason for the enactment requiring the city to make of record the fact whether the work had been ordered upon petition therefor or upon the council's own motion. A petition granted is one thing; a petition rejected or not acted upon is quite another. Whether a waiver of this character made by a grantor binds or charges the property in the hands of a grantee who purchases it after the petition has been signed, but before the work has been completed, or any assessment made, is not necessarily involved in this record, and we do not undertake to decide it.

It is further argued that plaintiff is estopped to maintain this action because Mr. Bailey was himself the city's attorney from April, 1908, to December, 1900, and as such attorney, and after he purchased the property, approved the form of contract between the city and the paving contractor who performed the work. We see none of the elements of estoppel in this transaction. His executrix does not now contest or deny the liability of his property for its just and proper proportion of said improvement, and surely the city suffers no wrong in being prevented from exacting more than such proportion.

3. SAME: special assessments: estoppel.

Again, it is said that the plaintiff does not come into

this equitable proceeding with clean hands, and therefore, whatever may be said of her strictly legal rights, she is not

entitled to any relief at the hands of the court.
 4. SAME: excessive assessment: burden of proof. We are at a loss to understand upon what principle of equity or of morals it can be said

that Mr. Bailey or his executrix is chargeable with any lack of strict rectitude so far as the facts and circumstances are disclosed in this record. The appellant claims the right to assess this property for the expense of making these improvements. The appellee admits that right, and under the decree below her property is taxed for that purpose to an entire one-fourth of its value—the full proportion allowed by statute—but she denies and contests the right to burden her property in excess of that limit. The burden of showing some ground upon which the city may avoid such statutory restriction and compel this property or its owner to pay a larger proportion is upon the appellant. In our judgment that burden has not been sustained, and the district court did not err in so holding.

II. A somewhat more difficult question is encountered when we come to consider whether the entire work of paving, curbing, and guttering is to be considered as a single improvement. The statute gives to cities power to

5. SAME: paving: statute: construction. improve any street by grading, parking, curbing, paving, and guttering the same and to assess the cost thereof upon abutting property subject to the limitation upon the maximum assessment hereinbefore mentioned. Code, section 792, and Code Supp., section 792a.

The argument on the part of the city is that this statute makes the work of paving, curbing, and guttering independent items of street improvement, and the council may lawfully so treat them, and make them the subject of separate and distinct contracts. Starting with this construction of the statute, it is insisted that the council did not exceed its powers in making the pavement, and the curb and gutter which border it, the subject of separate contracts, each of which in the

matter of assessments upon abutting property is to be considered without reference to the other, and for the cost of either of which assessments may be made up to the 25 per cent. limit. If this be true as broadly as claimed, then the owner of a lot abutting upon a city street is indeed in a desperate strait, for such construction would enable the city at one and the same time to park, curb, pave, and gutter the street by four separate contracts, followed by four separate special assessments each up to the full limit of 25 per cent. of the actual value. We cannot believe that such result or such possibility was contemplated by the Legislature. It is doubtless true that in the outlying and less crowded parts of a city it is sometimes found desirable to improve and use streets in an unpaved condition and sometimes to curb or gutter the same, and let the larger enterprise of paving await the growth of the city and the increase of traffic which shall justify it. Under such circumstances, we think there can be no reasonable doubt that the city can order either or any of such improvements, and lawfully provide for assessing the cost upon abutting property. But, when it undertakes to pave a street not already supplied with suitable curbs and gutters, we are of the opinion that "paving," as the word is used in the statute and as understood and employed in ordinary usage, includes both curb and gutter without which a pavement is manifestly incomplete. It has been held that authority to pave includes authority to complete the same by the construction of curbs and gutters because "the curbstones are necessary in order to secure the gutters, and are in this view a part of the pavement of the street." *Warren v. Henly*, 31 Iowa, 31; *Downing v. Des Moines*, 124 Iowa, 289. The different powers conferred upon the city for the improvement of streets are designed to meet different conditions and relieve different needs; but from the fact that under appropriate conditions the city may lawfully require either curbing, guttering, or paving it does not follow that, in ordering the paving of an uncurbed or unguttered street, it can make paving, guttering, and curb-

ing a matter of two or three independent improvements, and thereby avoid the limit which the law places upon the burden cast upon abutting property. A very similar question arose in New York where the limit of a special assessment for any one improvement is one-half of the value of the property. In that case, as in this, the city undertook to levy separate assessments for paving and for curbing and guttering, the aggregate of which assessments was in excess of the legal limit. The work was done under separate resolutions or orders, one of which was dated in the year 1871 and the other in 1872. Of this state of facts the court says:

If these assessments, though resulting from separate apportionments and though confirmed at different times, are for the expense of what is practically and really one improvement, then the phrase from the act of 1840, 'in any one case,' applies, and there was substantial error in the assessment. . . . If the paving of a street is so disconnected from other work upon the street in necessity and effect as to be a different and separate improvement from grading, regulating, setting of curb, and gutter stones and flagging, or if the adoption of a peculiar kind of pavement is so, then there may be said to have been two classes of improvement upon this street. If they are not so disconnected, then it cannot be said that there was that lapse of time between the ordering of them as to make them distinct. . . . That it was not all done at once does not necessarily determine that it was two distinct improvements. Necessarily regulating and grading must precede paving, and so must to some degree the setting of curb and gutter stones. Nor is the fact that there were different kinds of pavement on different parts of the street conclusive that these were distinct improvements. . . . If one improvement, then there should have been but one assessment; and, if but one assessment, it could not have exceeded the half assessed value of the lots, and, as it does exceed that, it is to some extent illegal. (*In re Walter*, 75 N. Y. 356.)

The propriety and justice of such holding is too manifest to require argument in its support. That the paving, curb-

ing, and guttering in cases of this character do constitute a single improvement is quite clear. That it is so regarded by engineers and others skilled in such work appears in evidence, and, even if such evidence be held inadmissible, the fact is one of common observation and common knowledge which the court cannot ignore. See our cases already cited. *Warren v. Henly*, 31 Iowa, 31; *Downing v. Des Moines*, 124 Iowa, 289. See, also, *Schenley v. Commonwealth*, 36 Pa. 29 (78 Am. Dec. 367); *Jacquemin v. Finnegan*, 39 Misc. Rep. 628 (80 N. Y. Supp. 207); *Huidekoper v. Meadville*, 83 Pa. 158. In the case before us the curb and guttering were first ordered and a curb and gutter were first constructed, but, being rejected by the city, they were reconstructed at or about the same time and part of the same general improvement with the paving. As already remarked, the mere difference in time between the orders upon which such work was done is not sufficient to make it anything more or less than a single improvement.

It follows from the foregoing discussion that the trial court did not err in treating the two assessments as constituting a single burden and applying thereto the limit fixed by the statute.

The judgment appealed from is therefore *Affirmed*.

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ACCORD AND SATISFACTION TO ACTIONS **ACCORD AND SATISFACTION.**

Settlement: Tender: Acceptance: Effect. Where there was a good faith dispute and disagreement as to the amount due on an unliquidated claim, a tender of a certain sum in full settlement and liquidation of the claim must be either unconditionally accepted or rejected. The acceptance and crediting of a sum tendered in full payment on the amount claimed will constitute an accord and full satisfaction. *Sparks v. Spaulding Mfg. Co.*, 491.

Settlement of litigation by referee in bankruptcy. A settlement of litigation made by a trustee in bankruptcy and approved by the referee, after notice to creditors, was valid and binding. *Lake v. Dredge*, 725.

ACCOUNTING. See **PARTNERSHIP.**

ACTIONS.

Certiorari: Who may maintain same. Certiorari is not a remedy available to an individual who has no direct interest in the matter to be reviewed, and who does not show that he will suffer special injury beyond that which will affect him in common with the general public, or others similarly situated; especially where there is another available remedy. *Keely v. Supervisors*, 205.

Change of venue: Implied contract: Waiver of error. An action must be brought in the county where the defendant resides, unless founded upon a written contract expressly providing for performance at some other place. A contract by implication will not confer jurisdiction in a county other than that of defendant's residence. So that where a lease providing for payment of rent in a county other than the tenant's residence had expired, an action in that county for rent which accrued while the tenant was holding over was on an implied contract, and subject to removal; and the error in refusing the change was not waived by going to trial. *Wixom v. Hoar*, 426.

ACTIONS Continued

TO

AGENCY

Change of venue: Waiver. Nor was the error in denying a change of venue in this case waived by reason of the fact that some time after the ruling on the motion to change the defendant filed a substituted answer, admitting that he used and occupied the lands described in the petition substantially on the terms alleged, and that the agreed rental was the sum stated by the plaintiff and was payable at the place specified by him. *Idem.*

Misjoinder of causes. An ordinary law action cannot be joined with an action in equity; and when tendered by an amendment it should be stricken on motion. In this action to enjoin the enforcement of an ordinance relating to wharfage fees, an amendment alleging payment of the fees under duress, and seeking to recover the same back, should have been stricken for misjoinder. *Keckevoet v. City of Dubuque*, 631.

ADVERSE POSSESSION. See PARTITION—REAL PROPERTY.

AGENCY.

Contracts: Revocation. Although an agency contract for the sale of land on commission provided that it should expire at a certain date, it was subject to revocation by the principal at any time prior thereto. *Mosnat v. Berkheimer*, 177.

Contracts: Revocation: Notice: Evidence. To be effective notice of the revocation of an agency contract for the sale of land must be given to the agent and those who, from a knowledge of his authority or previous dealings with him, would be likely to continue to deal with him relying on his authority. In this action the evidence is held to justify a finding of such notice to a purchaser as would put a prudent man on inquiry as to the agent's authority. *Idem.*

Action for commission: Evidence. In this action for commissions for finding a purchaser for coal lands of defendant, the evidence is held to require submission of the question of whether plaintiff found a purchaser for the land, under the alleged agreement with defendant to do so for a compensation. *SeEVERS v. Cleveland Coal Co.*, 574.

Instructions: Conformity with issues. Where the petition alleged no agreement as to the amount of commissions to be paid for finding a purchaser for land, and there was no evidence that the reasonable value of the service was a certain percentage, but the evidence showed that a less percentage had been paid in such

AGENCY Continued

cases, an instruction that the measure of plaintiff's recovery was a certain specified percentage of the purchase price was erroneous. *Idem.*

Same. In an action for commissions for the sale of land, in which it was admitted that the price of the land was not fixed and that plaintiff did not have the exclusive right of sale, an instruction that the fact that defendant did not know that the purchasers had been communicating with plaintiff about the land was not controlling, and that plaintiff had but simply to find a purchaser able, ready and willing to buy to be entitled to his commission, was erroneous. *Idem.*

Same: Procuring cause: Instruction. It is the duty of the court when it attempts to instruct upon a matter which the parties have raised by the evidence to give a proper instruction. Thus where there was evidence tending to show that at the time when the owner and the purchaser of land, claimed to have been produced by plaintiff, met to consider the matter, the owner was not aware that plaintiff had been corresponding with the purchaser or was instrumental in calling his attention to the lands, and the purchaser was not aware that the lands were those concerning which he and plaintiff had corresponded, the court should have instructed that if the jury so found then plaintiff could not be said to have brought the parties together, and was not the procuring cause of the sale. *Idem.*

Same: Agency contract: Implied promise to pay. Mere knowledge by the owner of lands that one in his employ is performing a particular service in procuring a customer, with the expectation of receiving extra compensation, is not sufficient to raise an implied promise of the employer to pay an additional sum; the employee must go further and prove an agreement for extra compensation. *Idem.*

Same: Estoppel: Ratification; Pleading. A contract by ratification, or perhaps estoppel, may be proved under a general allegation that such a contract was made, although as a rule estoppel must be pleaded; as the question then becomes one of evidence to prove the contract rather than one of estoppel. *Idem.*

Commission contract: Pleading: Recovery. Where an agent seeks to recover compensation for negotiating an exchange of property, and alleges an express contract to pay a stipulated price for his services, he cannot recover on *quantum meruit*. *Stapp and Hendrick v. Godfrey*, 376.

AGENCY Continued

TO

APPEAL

Same: Middleman: Right to commissions. An agent in acting as a middleman simply undertakes to get the parties together, and not to negotiate for either of them; and when understandingly employed he may receive a commission from both, with or without the consent of the other. *Idem.*

Same: Instruction. Where the pleadings, in an action to recover commissions for the exchange of property, are drawn wholly upon the theory that defendant knew plaintiff was to receive compensation from the other party, and not that plaintiff was simply acting as a middleman for the sole purpose of bringing the parties together, there was no necessity for an instruction defining middleman, in the absence of a request. *Idem.*

Same: Right to commissions: Instructions. If an agent is employed simply to get the parties together, with no power to negotiate for either, the law implies notice to the principal that he may receive a commission from both; but if he is employed to find a purchaser or make a sale, he cannot receive compensation from both without the consent of each; and where the case was tried on the theory of actual knowledge by defendant that plaintiff was to receive compensation also from the other party, and the court submitted the case on that theory, plaintiff could not complain that the court did not instruct on the theory of implied notice. *Idem.*

Same: Middleman. An agent employed by both parties to make an exchange of properties, and who actually participates in the negotiations, is not a middleman. *Idem.*

Same: Pleadings: Burden of proof. Where the plaintiff alleged an express contract for the payment of commissions, and in reply to the defense that he had received compensation from the other party, he alleged that defendant knew that he was expecting the same, the burden was upon him to show that defendant had such knowledge when he promised to pay plaintiff a commission. *Idem.*

ANTI-PASS LAW. See STATUTES.

APPEAL. See DRAINAGE—MORTGAGES—WILLS.

Abstract: Time of filing. Where appellee's amended abstract was filed as soon as the points for reversal relied upon by appellant were known, though not in time, it will not be stricken. *Kerr v. Yager*, 69.

APPEAL Continued

Abstract: Cost of printing. Where the appellee failed to number the lines or to index his amendment to the abstract the cost of printing the same was taxed to him, but the abstract was not stricken. In re Estate of Oldfield, 98.

Additional abstract: Motion to strike. Where the appellant's abstract did not set out a full statement of the agreed statement of facts on which the case was submitted, appellee's additional abstract containing a complete copy of the same, will not be stricken, although the entire stipulation may not have been required to make the correction. Theobald v. Flynn, 360.

Appeal by infant: Jurisdiction: Dismissal. Although an appeal taken by a minor himself rather than through his guardian is irregular, still the court will acquire jurisdiction thereby, and the appeal should not be dismissed for that reason. First National Bank v. Casey, 349.

Parties: Dismissal. A member of a co-partnership against whom judgment was entered on default need not be made a party to an appeal by the other, as a reversal of the judgment could not affect him prejudicially; and failure to serve the co-partner with notice was not ground for dismissal of the appeal. *Idem*.

Notice: Sufficiency. A notice of appeal need not be signed by the appellant in person; it is sufficient if signed by his attorney. In re Estate of Oldfield, 98.

Notice of appeal: Parties. Co-parties whose interests may be prejudicially affected by a modification or change of the judgment must be served with notice of the appeal; and the fact that notice of the action was served outside the state will not obviate the necessity of serving notice of appeal. Tukey v. Foster, 311.

Same. Where the reversal on appeal of a decree foreclosing a mortgage on a judgment *in rem* would continue the obligation without affording any relief by way of subrogation, the mortgagor and purchasers of the mortgaged property were co-parties whose interests would be affected by the reversal, and should be served with notice of the appeal. *Idem*.

Settlement of litigation: Effect. On appeal from a judgment cancelling a conveyance, the appellant cannot maintain the appeal, where, pending the same the litigation was settled, and where he did not return or offer to return the consideration received, although he was unable to return the same. Lake v. Dredge, 725.

APPEAL Continued**TO****ATTACHMENT**

Reviewable questions. In habeas corpus proceedings for the discharge of one arrested for violating the anti-pass law, tried upon an agreed statement of facts in which no question of burden of proof was raised, and defendant did not testify, the provisions of the law relating to privilege from testifying and exemption from prosecution were not involved, and therefore not reviewable on appeal. *Schultz v. Parker*, 42.

Findings of fact: Review. Where the evidence is in such conflict as to require submission of the issue to the jury, its finding will not be reversed on appeal. *O'Neil v. Redfield*, 246.

Timeliness of action: Review. Where objection to the timeliness of an action was in no manner brought to the attention of the trial court it will not be considered on appeal. *Waterloo Lumber Co. v. Des Moines Insurance Co.*, 563.

ARGUMENT. See **NEW TRIAL**.

ATTACHMENT.

Judgments: Service by publication. Personal judgment cannot be rendered against a defendant in attachment proceedings who was served by publication, and jurisdiction will not be acquired until it is ascertained that the garnishee is indebted to him. *Gutschenritter v. Whitmore*, 252.

Garnishment: Judgment: Service by publication. A judgment against a garnishee served by publication is not to be regarded as final like a personal judgment; neither is it evidence that anything was owing by him, nor is it a bar to subsequent action, unless satisfied by the garnishee; nor can an action be maintained thereon; and it may be assailed by other attaching creditors or by strangers. *Idem*.

Same: To sustain a judgment against a garnishee there must be a finding that defendant was indebted to plaintiff, and that the garnishee was indebted to the defendant, otherwise the entry will be of no validity. In the instant case the amount owing by defendant to plaintiff was not expressly found, but clearly to be inferred from the findings therein, and is sufficient to authorize judgment against the garnishee. *Idem*.

Same: Judgment: Sufficiency. A judgment entry in garnishment proceedings which recited that the cause came on for hearing on

ATTACHMENT Continued **TO** **CARRIERS**
the answer of the garnishee, the defendant not appearing, and that legal notice of the action and of the garnishment had been given by publication, proof of which was on file, and that the garnishee was indebted to the defendant in a stated sum, sufficiently referred to notice of the suit and of the garnishment. *Idem.*

Same: Where the attachment defendant was served by publication so that personal judgment could not be rendered against him, the judgment against the garnishee need not refer to the original judgment against the defendant. *Idem.*

ATTORNEY'S FEES. See **GUARDIANSHIP.**

AUTOMOBILES. See **NEGLIGENCE.**

BANKRUPTCY. See **ACCORD AND SATISFACTION.**

BONDS. See **SCHOOLS.**

Irrigation bonds: Liens: Statutes. Irrigation bonds issued under the statutes of Colorado, which provide for the issuance of irrigation district bonds to be paid from annual assessments upon the land within the district, are not a special lien upon the lands of the district, but the assessments levied for payment of the bonds are liens; and a decree of court which attempts to make the bonds a specific lien is in excess of jurisdiction. *Condit v. Johnson*, 209.

Same: Foreign laws: Presumption. In the absence of any showing to the contrary it will be presumed that the statutes and laws of another state are the same as those of this state; and under the law of this state the bonds issued for a public improvement are not a lien upon the property of the municipality or district. *Idem.*

BOUNDARIES. See **REAL PROPERTY.**

BURGLARY. See **CRIMINAL LAW.**

CARRIERS.

Transportation of live stock: Contracts for special service: Invalidity. The agreement of a railway company with the shippers of live stock that if the latter would get together, or induce others to join them, and furnish sufficient stock to fill ten cars or more the company would furnish a special train for its shipment from

CARRIERS Continued TO CONDEMNATION OF PROPERTY

a point in Iowa to Chicago, at rates charged for transportation in regular trains, is in violation of the Interstate Commerce Act and void; and no recovery can be had for injury occasioned by its breach. *Siemonsma v. Railway Co.*, 483.

Transportation of live stock: Negligence: Pleadings: Evidence.

Where the plaintiff in an action for negligence in the transportation of live stock made no general allegations concerning the condition of the stock when delivered to the defendant, and when received at its destination, but specifically alleged particular acts of negligence, his recovery is dependent upon proof of the particular acts. In this action it was alleged that by switching the car in a negligent manner the horses were thrown down and one was so injured as to cause its death. *Held*, that the evidence of the negligence charged was sufficient to take the issue to the jury. *Thompson v. Railway Co.*, 235.

Same: Negligence: Evidence. The fact that a shipper of stock accompanies the same and undertakes to look after it in a limited way does not relieve the carrier of the duty to use due care in handling the car. In this action the question of defendant's negligence in handling the car was for the jury. *Idem*.

Same: Evidence of experts that one of the horses was incurably sick at the time of the injury was not conclusive that its death was not caused by the negligent handling of the car, where there was also evidence that the animal was well before the accident, and that after being thrown down and trampled upon by other horses it was thereafter sick until it died; but the question of the cause of its death was for the jury. *Idem*.

Same: Instructions. The mere fact that a veterinary surgeon might have had another and better chance of saving an animal injured while en route would not of itself render the carrier liable for its death; and refusal of an instruction to that effect, of which there was no evidence, was proper, even though correct in the abstract. *Idem*.

CERTIORARI. See ACTIONS.

CHANGE OF VENUE. See ACTIONS.

COMMISSION CONTRACTS. See AGENCY.

CONDEMNATION OF PROPERTY. See EMINENT DOMAIN.

CONTRACTS

CONTRACTS. AS AFFECTING REAL PROPERTY, See THAT TITLE.
See also AGENCY—INFANTS—INSURANCE—SALES.

Construction. Where an instrument is partly written and partly printed, the written portion will control in case of apparent inconsistency. *Low v. Mullarky & Long*, 15.

Contract of employment: Breach: Action therefor. Where an insurance society refused to perform its contract of employment with an officer and agent, to pay a stated salary per month and expenses in advance, the agent was entitled to treat the refusal as a breach of the contract and to sue therefor at once. *Kelley v. Royal Neighbors*, 547.

Same: Discharge of agent: Evidence. Where the plaintiff as the agent of the defendant society accepted compensation for her services for a time, as requested by the supreme officer, after the board of managers had recommended her discharge, but prior to the expiration of her term of office, the bill and voucher for such service was admissible, in an action for salary for the balance of the term; as bearing on the defense of acquiescence in the disapproval of the board to her continuing the service for the term. *Idem*.

Same: Compensation: Evidence. Where an agent of the society was discharged from one position and given another, a witness who had held the second position was competent to state the amount that might be earned in such employment by the exercise of reasonable diligence. *Idem*.

Same: Recovery of compensation: Tender of services: Evidence. Where the evidence was such as to indicate that a tender of plaintiff's services for the balance of the term would have been unavailing, the questions of whether it was necessary for plaintiff to have tendered performance in order to recover, or whether she acquiesced in her claimed discharge, were for the jury. *Idem*.

Same. Where the by-laws of an insurance society provided that the supreme officer and board of managers should determine the salary one employed as instructor should receive, evidence that at a meeting of the board at which the supreme officer was present and participated in, a resolution was adopted that no person employed as instructor should receive any salary except such as local lodges might pay, was admissible in an action for breach of the contract of employment, based on refusal of the society to pay the salary. *Idem*.

CONTRACTS Continued

Same: Measure of damages. In an action by a servant to recover compensation for the balance of the term of employment, after an alleged improper discharge, the measure of damages is the difference between the amount she would have earned under the contract and the amount actually earned, or which might have been earned, in similar employment during that time. *Idem.*

Contract of employment: Recovery on quantum meruit: Evidence. One basing an action for services entirely upon an express contract cannot recover upon *quantum meruit*; but direct evidence of the contract is not required to authorize recovery if the facts and circumstances fairly show such agreement. The fact that plaintiff performed services for deceased when taken in connection with the character of the service, absence of relationship, and all the surrounding circumstances, are held sufficient to raise a presumption that plaintiff entered the service under an express agreement. In re Estate of Oldfield, 98.

Same: Limitations. Where the evidence showed that the service was continuous for a series of years, with the exception of two or three brief absences or visits, that part of the claim accruing more than five years prior to commencement of the action was not barred. *Idem.*

Same: Instruction. An instruction authorizing recovery for services regardless of the express agreement relied upon by plaintiff was erroneous. *Idem.*

Same: Instructions: Amount of recovery: Reversible error. An instruction authorizing recovery on one count for personal services of more than the amount claimed in the petition was reversible error; it being impossible to determine on appeal how much was allowed on each count. *Idem.*

Merger. The oral agreement of a decedent to convey certain land in consideration of services rendered is merged in and satisfied by a subsequent conveyance of his land to claimant, even though the grantee paid full consideration under the written contract. Rageth v. Bolinger, 152.

Pleadings: Evidence. Where the cause of action as pleaded was based upon a written contract to sell goods on commission, admission of evidence of a subsequent oral agreement of a different character was reversible error. Bradley, Merriam & Smith v. Goetsche, 77.

CONTRACTS Continued

TO

CONVEYANCES

Performance: Demand: Damages. Where the grantor of land, as one of the provisions of the contract of sale, agreed to take up and carry for a definite time a mortgage assumed by the grantee in case the mortgagee would not extend the time of payment, the grantee was not bound to ascertain whether the mortgagee would extend the same prior to the date of its maturity, or to demand of the grantor on the date of its maturity that he take the same up, to authorize recovery of damages for breach of the agreement; but it was sufficient if he gave notice and made such demand within a reasonable time. *Johnson v. Converse*, 684.

Rescission: Return of consideration. A contract for the settlement of litigation, though procured by fraud, is only voidable; and can only be rescinded and cancelled by returning, or offering to return, the consideration received thereunder. *Lake v. Dredge*, 725.

CONSPIRACY. See **CRIMINAL LAW**.

CONVEYANCES.

Covenants: Liability of grantor. Where the purchaser of mortgaged premises conveyed a portion by warranty deed, he was liable on his covenant to his grantee for the amount required to redeem the land from mortgage foreclosure. *Tukey v. Foster*, 311.

Delivery: Presumption. The due execution and recording of an instrument raises a presumption of its delivery not later than the date of its acknowledgment, but this presumption is not conclusive and it may be overcome. *Tucker v. Glew*, 231.

Same: Recital of consideration: Effect. A conveyance which recites a valuable consideration as having been paid cannot be converted into a trust or made testamentary in character by showing that there was no consideration. *Idem*.

Covenants against incumbrance: Breach: Damages. The rule that a warrantee against incumbrances who has not discharged the incumbrance can only recover nominal damages from his warrantor, while applicable to law actions is not controlling in equity; as a court of equity has power to award substantial damages in advance of actual payment and at the same time provide against double liability of the warrantor by a proper provision in the decree. In the instant case the decree failed to provide against double liability. *Boice v. Coffeen*, 705.

CONVEYANCES Continued TO CRIMINAL LAW

Covenants against incumbrance: Breach: Measure of damages. As a general rule recovery upon a covenant of warranty cannot exceed the consideration received by the warrantor; and it is also a general rule that where a covenant against incumbrances is breached and the warrantee is compelled to pay the same to protect his title, the amount so paid is presumptively the amount of his damage: So that a grantee taking the title with full covenants is entitled, in a suit to foreclose the mortgage, to a judgment against his warrantor for the amount necessary to discharge the same, in the absence of any claim that the amount of the mortgage exceeded the consideration received by his covenantor. *Idem.*

Statute of frauds: Consideration. The satisfaction of a pre-existing debt is a sufficient consideration for the conveyance of land, and amounts to such payment as to take the transaction out of the statute of frauds. *Kerr v. Yager*, 69.

CORPORAL PUNISHMENT. See SCHOOLS.

COSTS. See INTOXICATING LIQUORS—PARTITION.

CO-PARTIES. See APPEAL.

CONSTITUTIONAL LAW. See PARTITION—STATUTES.

CO-TENANTS. See REAL PROPERTY.

COURTS.

Police courts: Jurisdiction: Statutes. Police courts, in cities having no superior courts, have jurisdiction of a civil action to recover a tax which has not been paid, in violation of an ordinance requiring certain citizens to perform labor upon the streets. or to pay a stated sum in lieu thereof. *City of Ottumwa v. Scott*, 385.

CRIMINAL LAW.

Assault and battery: Corporeal punishment: Evidence. On this prosecution of a school teacher for the corporeal punishment of a pupil, the evidence is held to require submission of the question of whether the punishment was immoderate and unwarranted, and to support a finding of assault and battery. *State v. Davis*, 501.

Conflicting instructions: Instructions in assault and battery dealing with the supposed state of facts as contended for by the state, and directing a verdict for plaintiff if such facts are found to be

CRIMINAL LAW Continued

true; and another instruction dealing with the facts as contended for by defendant, with direction to return a verdict for him if found to be true, no complaint being made as to the correctness of either, were not contradictory in the sense that they were prejudicial to defendant. *Idem.*

Burglary: Evidence. In this prosecution for burglary of a bank, the evidence, wholly circumstantial but unexplained, is held sufficient to take the issue of defendants' guilt to the jury, and to support a verdict and judgment of conviction. *State v. Burns*, 440.

Evidence: Refreshing the recollection of witness: Discretion. Where a witness in testifying to the identity of bank bills was unable to recall the name of the issuing bank, permission to examine the bills of the bank for the purpose of refreshing the recollection was within the discretion of the court; the good faith of the witness in afterward testifying as of his independent recollection being for the court and jury. *Idem.*

Burglary: Evidence of accomplice: Corroboration. The corroboration of the testimony of an accomplice required by the statute to sustain conviction must be by testimony independent of that which comes from the accomplice, and must tend to connect the accused with the commission of the offense. On this prosecution for burglary the evidence is held insufficient to corroborate the accomplice and to connect defendant with the commission of the crime. *State v. Duncan*, 652.

Same. The mere finding of a revolver taken from the burglarized premises tended to show nothing more than that the premises had been broken into, and was insufficient for the purpose of corroborating the accomplice or connecting defendant with the commission of the crime. *Idem.*

Burglary: Breaking: Circumstantial evidence. Where the only reasonable inference from the proven circumstances is that there was an actual breaking, a conviction for burglary will not be set aside because of the absence of direct evidence on the subject. *State v. O'Brien*, 659.

Evidence: Notice of additional evidence: Return of service: Review. The return of service of notice of the taking of additional evidence in a criminal case, stating that the sheriff served the same by "reading said notice to each of said defendants and delivering them a true copy thereof" was a sufficient return to show complete service on each defendant, although it would have been more

CRIMINAL LAW Continued

exact if stating that a copy was delivered to each defendant; and where there was no attempt to bring the claimed defective notice fairly to the attention of the trial court it will not be considered on appeal. *Idem.*

Witnesses: Indictment: Variance in name. The fact that the surname of a witness, who was before the grand jury, was not properly spelled on the back of the indictment to which his testimony was attached will not justify the rejection of his evidence, where his identity was clearly ascertainable from his evidence and his name as actually written on the indictment. *Idem.*

Conspiracy: Evidence of co-conspirator. Where parties conspire to commit a larceny evidence of the acts and declarations of one in promotion of the conspiracy are admissible against the other. In the instant case the evidence is reviewed and held to justify a finding of conspiracy by defendant to commit a larceny and to render the declaration of the co-conspirator admissible. *State v. Lehman*, 183.

Larceny: Recent possession of stolen property; Evidence: Instruction. On this prosecution for larceny, in which the state relied upon a conspiracy between the defendant and a third person to commit the crime, the evidence showed that the stolen goods were found in a certain room and in a satchel previously seen in the possession of the third person. The only evidence that defendant occupied the room was the finding of a collar therein of the size worn by him. *Held*, that the evidence was not sufficient to support an instruction on the unexplained possession of recently stolen property, and that the instruction given, to the effect that the finding of the stolen property in the room was presumptive evidence of defendant's guilt, was erroneous, because failing to require a finding that defendant and such third person acted in concert in the commission of the crime. *Idem.*

Larceny. Where the court instructed that the defendant should be acquitted unless it was found that the larceny was committed on the date alleged, refusal to further charge that he could not be found guilty of any act done after that date was not erroneous. *Idem.*

Larceny: Hearsay evidence: Prejudice. On this prosecution for larceny, in which the state relied upon a conspiracy to commit the crime, there was evidence simply of the finding in a certain room of a collar of the size worn by defendant, and of a satchel previously seen in the possession of the co-conspirator: *Held*, that this was

CRIMINAL LAW Continued

not sufficient proof of their occupancy of the room to render admissible and non-prejudicial the statement of officers, who located the stolen goods and arrested the parties, that they had previously heard that accused and a third person were occupying the room. *Idem.*

Malicious mischief: Evidence: Malice. On a prosecution for malicious injury to any building or fixtures attached thereto, the property of another, it may be shown that at the time defendant did the things complained of he used abusive and profane language, as bearing upon the question of malice; and as so limited by the court in this instance the evidence was properly received. *State v. Waltz, 191.*

Evidence: Flight. Where defendant, in a prosecution for malicious injury committed while intoxicated, was first convicted of drunkenness and ordered to work out his fine, but fled and was subsequently arrested on the graver charge, evidence of his flight was properly received; it being for the jury to determine whether he fled to escape his sentence for drunkenness, or through fear of prosecution for the graver offense. *Idem.*

Malice toward owner of property. Malice toward the owner of property maliciously injured must be established, but it is not necessary that defendant should have known at the time of doing the act who the owner was. If at the time of doing the act he was bent on mischief, prompted by an evil mind to maliciously destroy or injure the property without regard to its ownership, that is sufficient malice toward the owner to meet the requirements of the law. *Idem.*

Excessive sentence. A sentence to the state reformatory of one who, in an intoxicated condition, entered a building, used abusive and profane language, tore loose a machine fastened to the floor by screws and broke and tore down an electric fixture, was excessive, and is reduced to six months in the county jail with credit for time already served. *Idem.*

Murder: Self-defense: Evidence. Where the defendant in a prosecution for murder offered evidence of the general reputation of deceased for viciousness, and himself testified that deceased had told him of killing a man some time previously, and that other like difficulties with deceased had come to his knowledge, the exclusion of the evidence of a witness that he had heard deceased say that he had shot a man in the back, offered on the question of self-defense, was not erroneous, in the absence of a showing that such

CRIMINAL LAW Continued

fact was brought to the knowledge of defendant. The evidence on this prosecution for murder is reviewed and held to support conviction for murder in the second degree. *State v. Buford*, 173.

Murder: Instruction. Merely consenting to the commission of an offense is not under all circumstances punishable as a crime; but where defendant admitted that he struck deceased at the time and place in question, the instruction that if defendant alone, or with his co-defendant, or either of them, the other being present aiding, abetting or consenting thereto, did kill the deceased, defendant would be guilty, was not erroneous as advising the jury that defendant might be convicted if standing idly by and took no part in the affray. *State v. Young*, 647.

Same: Withdrawal from an affray: Instruction. Where one in good faith withdraws from a combat he ceases to be a wrongdoer, if his adversary has reasonable ground to believe that he has so withdrawn, even though such withdrawal is not clearly evinced. But where it appeared that the defendant was an aggressor at all times during the affray, and never at any time indicated his withdrawal, or that he intended to withdraw, he was not prejudiced by an instruction to the effect that his withdrawal from the combat must be clearly signified. *Idem*.

Rape: Evidence. Where the imbecility of a prosecutrix for rape was clearly established, the admission of evidence that she was odd, cried without apparent reason and was lacking in will power, was not prejudicial. *State v. McKinnon*, 619.

Same: Cross-examination. Where a relative of the prosecutrix had testified to her imbecility and that she was present at his home when the defendant, accused of rape, called and took her away in his buggy, the question of whether he knew at the time that defendant had paid some attention to her, was properly excluded on cross-examination; as the witness had no control over the prosecutrix, and even if he had he might rightfully have assumed that the intentions of defendant were honorable. *Idem*.

Immaterial evidence. Where a witness had testified on direct examination to the age at which the prosecutrix had learned to walk, and that she had never learned to talk very plainly, his cross-examination as to the age her brothers and sisters learned to walk and talk, was properly excluded as immaterial; and even if material it was within the discretion of the court to exclude it as improper cross-examination. *Idem*.

CRIMINAL LAW Continued

Same. A requested instruction that the term "effectual resistance" means simply ordinary, usual and fair resistance, was properly refused; because implying an element of moderation or acquiescence in the quality of resistance which a normal woman would put forth, not contemplated by the language of the statute. *Idem.*

Imbecility of prosecutrix: Statutory offense. On a prosecution for rape committed on an imbecile female, it is only necessary to show that her imbecility was such that effectual resistance was impossible; and when such imbecility is shown it becomes immaterial whether she did in fact resist, or what other circumstances aided in her pollution. *Idem.*

Instructions: Definition of technical terms. Where a criminal statute involves technical terms not within the common use and understanding of the jury, it is incumbent upon the trial court to define the same, so that the jury may clearly understand their meaning and import; but the term "effectual resistance," as used in the statute with reference to carnal knowledge of an imbecile female, has no technical legal meaning, as distinguished from its ordinary meaning, and a requested instruction defining the same was properly refused. *Idem.*

Same. Where counsel desires an instruction which will aid the jury in understanding a statute difficult to render plainer by definition, it becomes his duty to formulate and present a proper instruction; it is not sufficient that attention is directed to the subject by an improper request to cast that duty upon the court. *Idem.*

Seduction: Evidence: Cross-examination. Where a prosecutrix for seduction testified on direct examination that she had kept company with defendant and had gone with one certain other party, but could think of no others, her cross-examination as to her going with other named young men was proper. *State v. Hector, 664.*

Same: Impeaching evidence: Privileged communications. Where a prosecutrix for seduction, in explanation of the reason why she had not stated to the grand jury certain matters testified to on the trial, said that she was not interrogated with respect to such matters, the defendant should have been permitted to show by the county attorney, who was before the grand jury in that capacity, questioned the witness and acted as clerk in taking down the minutes of her evidence, that she was in fact questioned regarding such matters and testified differently than she had upon the trial; as the evidence of the county attorney was not within the privilege of the statute. *Idem.*

CRIMINAL LAW Continued

TO

DAMAGES

Same: Instruction: Seductive arts. On this prosecution for seduction the instruction with reference to the extent of the seductive arts and deception practiced upon prosecutrix, which will warrant conviction, was supported by the facts and was a proper statement of the law. *Idem.*

Seduction: Evidence: Leading questions. A cause will not be reversed upon the single ground that the trial court improperly permitted the asking of leading questions, especially in cases of embarrassment, reticence or dullness of the witness, unless there has been a manifest abuse of discretion. *State v. Thomas*, 687.

Same: Admission of former evidence. Where a part of the testimony given on the former trial which could not be produced at the second trial, was read by the reporter at the instance of defendant, the state was entitled to the balance, for the same reason that the party against whom part of a conversation is admitted is entitled to have the remainder admitted. *Idem.*

Corroboration. Evidence that defendant, in a prosecution for seduction, waited upon the prosecutrix, was frequently with her upon the streets and other places at night, and that when told of her pregnant condition and her claim that he was the author of her shame, said that he was not trying to get away and aimed to make it right, was sufficient corroboration to take the case to the jury. *Idem.*

Instruction: Corroboration. The instruction in this case that if there was evidence aside from that of the prosecutrix tending to show that defendant was on intimate terms with her, and that he conducted himself toward her as a lover or suitor, or caressed or manifested apparent affection for her, such facts were proper to be considered on the question of corroboration, was not so prejudicial, in that there was no evidence of caresses, as to require a reversal, even though the jury may not be presumed to have observed the warning not to go beyond the evidence regarding these matters. *Idem.*

Verdict: Reversal. Where the jury and court who saw and heard all the witnesses believed those for the state, the verdict will not be set aside because of the character of the state's witnesses. *State v. Young*, 647.

DAMAGES. See CONTRACTS—CONVEYANCES—DRAINAGE—EMINENT DOMAIN—INTOXICATING LIQUORS—SALES.

Instructions as to amount of recovery. Where there was no question as to the amount of plaintiff's recovery, and there was nothing for

DAMAGES Continued

TO

DRAINAGE

the jury to do in that regard except to make the computation, it was proper for the court to advise the jury of the amount, in case they found the plaintiff entitled to recover anything. *Depugh v. Brown*, 165.

DEEDS. See CONVEYANCES.

DESCENT AND DISTRIBUTION. See ESTATES OF DECEDENTS.

DRAINAGE.

Establishment of district: Description of territory. The petition for the establishment of a drainage district should describe the land to be included by metes and bounds, or otherwise, so as to convey an intelligent description of such lands. Where, however, the petition adopted the description contained in the petition for the establishment of another district covering the same territory, so that the engineer was able to ascertain the lands intended, the description was not so defective as to render subsequent proceedings void. *Kelley v. Drainage Dist.*, 735.

Territory included. A new drainage district may be established covering precisely the same territory as one previously organized, for the purpose of enlarging the outlet and making the system more efficient. *Idem.*

Report of engineer: Survey. Where the engineer in charge of the establishment of a new drainage district, embracing the same territory as one previously established, had his field notes of the original survey and the plat then returned with his report, a new survey was not necessary; and a report accompanied by the plat of the previous survey, with lines clearly indicating the route of the new drains, though irregular, was sufficient. *Idem.*

Plan of improvement: Report of engineer. In the establishment of a drainage district the supervisors are limited to the adoption of the plan recommended by the engineer as practicable and likely to be efficient, and before ordering the improvement it must conform substantially with the plan as recommended. *Idem.*

Report of engineer: Omission of descriptions. The fact that the report of the engineer, in the formation of a new district embracing an old one, omitted a description of the several tracts included and the names of the owners, was not a jurisdictional defect; and as appellant appeared in resistance to the establishment of the district and to challenge the assessments, the omissions were not prejudicial. *Idem.*

DRAINAGE Continued

Notice of hearing: Service. Where the board in fact approved the plan of drainage recommended by the engineer, the fact that notice of the hearing on the petition and claims for damages was served prior to the adoption of the plan was not fatal to the proceedings. *Idem.*

Assessment: Waiver of remedies. Failure of a landowner, who was made a party to the proceedings for the establishment of a drainage district, to appeal from the action of the board in making an assessment is a waiver of all other remedies. *Idem.*

Benefits: Assessments: Evidence. The establishment of a drainage district involves a determination of the fact that all lands embraced therein will be benefited to some extent, and this question will not be reconsidered in levying the assessments; and evidence of no benefit is incompetent on the question of the excessive character of the assessments. In this case the new drains furnished an additional outlet and were of benefit to all lands tributary thereto, even though they did not touch some of the lands. *Idem.*

Classification and assessment of lands. Slight variance from the method prescribed for the classification and assessment of lands will be treated as immaterial, unless prejudice results. *Idem.*

Drainage of surface water: Easement: Evidence: Estoppel. Where one landowner constructed a drain through the land of another in pursuance of an agreement and in reliance thereon as affording an outlet for his surface water, and incurred expense in constructing the same and making his connection therewith, the grantees of the servient estate are bound thereby, and are estopped to obstruct the drain or deprive the owner of its beneficial use. The evidence in this action is held to show an agreement of defendant's grantor with plaintiff's ancestor for the construction of the drain over the land of defendant. *Schlader v. Strever*, 61.

Same: Natural drainage: Obstruction. A land owner may drain the surface water along a natural waterway, and an adjoining owner cannot rightfully obstruct the flow and turn the water back upon his land. *Idem.*

Same: Increased flow. Where a landowner has acquired an outlet for the drainage of his surface water through the land of another, he may by extending the lines of tile drain the low wet places in his land into the same, in accordance with the usages of good husbandry; not however diverting the water naturally tributary to another course of drainage in quantities injurious to the servient estate. *Idem.*

DRAINAGE Continued

Same: Right to drain over other land: Damages. Under the statute a landowner may lawfully drain his land into a natural water course, or depression on his own land which leads into a natural watercourse, without liability in damages to anyone; and where the natural drainage is not wholly upon his own land, but is carried to adjoining land in accordance with an agreement with the owner, the same immunity from damages exists. *Idem.*

Establishment of district: Notice: Names of parties: Sufficiency. The middle initial or name of a person is no part of the name in the sense that it must be used in a notice to land owners in drainage proceedings. *Collins v. Board of Supervisors*, 322.

Claims for damages: Dismissal. Where a party had sufficient notice of the establishment of a drainage district and did not file his claim for damages within the statutory time, both the supervisors and the court on appeal were justified in disallowing it; and as the statute plainly provides the penalty for such failure, without making any exceptions, the supreme court is not authorized to consider any equitable excuses. *Idem.*

Appeal: Dismissal. An appeal bond in drainage proceedings which has no other sureties than one of appellant's attorneys is not sufficient, and authorizes a dismissal of the appeal. *Idem.*

Assessments: Voluntary payment. Voluntary payment of an assessment for drainage purposes after an appeal from the assessment, though made under protest, will not excuse the party from the consequences of his act, and an order confirming the assessment will be approved. *Idem.*

Assessment: Presumption: Burden of proof. An assessment in drainage proceedings will be presumed to be equitable and just, and a party objecting thereto has the burden of showing that it was inequitable; and it is not enough to overcome the presumption to simply show that it exceeds the benefits of this particular land, as the assessments of other like lands in the district must be considered in determining the question of inequality. *Idem.*

Assessment: Review: Mandamus: Equitable relief. Where the board of supervisors properly rejected a claim for damages in drainage proceedings their action will not be reviewed in mandamus proceedings: Nor will a court of equity relieve a landowner from the consequences of his delay in filing his claim with the board by making the assessment itself. *Idem.*

DRAINAGE Continued

TO

EQUITY

Obstruction of surface water. A street railway company has no right to construct its roadbed and maintain the same so as to flood adjacent lands. *Nelson v. Railway Co.*, 81.

Same: Damages: Evidence. The value of crops destroyed by flooding the land upon which they were growing is competent evidence in an action by a tenant for such injury caused by an obstruction of flood water. *Idem.*

EASEMENTS. See REAL PROPERTY.

EQUITY.

Specific performance: Discretion. Specific performance of a contract is not a remedy which a litigant may demand as a right, but it rests in the sound discretion of the court; where, however, the evidence is sufficient and there are no equitable considerations in the way such decrees are entered as a matter of course. *Black v. Miller*, 293.

Specific performance: Homestead. A contract for the purchase of land including the wife's homestead may be enforced as to the non-homestead land over the objection of both husband and wife; the wife being adequately protected. *Mosnat v. Berkheimer*, 177.

Specific performance: Liability of guarantor. Where a vendor of land, which he had contracted to convey free of liens in settlement of litigation, had paid all taxes and assessments levied to pay irrigation bonds of the district in which the land was situated, and which were due at the time he offered to convey, he was entitled to specific performance of the contract of settlement; as the bonds themselves were not liens upon the land which he was bound to discharge. And where the purchaser failed to perform his part of the contract a judgment was properly rendered against his guarantor. *Condit v. Johnson*, 209.

Reformation of instruments: Burden of proof. One seeking to reform an alleged misdescription in a deed has the burden of showing the execution and delivery of the instrument, and of establishing the alleged mistake by clear and satisfactory evidence. *Tucker v. Glew*, 231.

Reformation of instruments: Evidence. In this action to reform a deed, the evidence is held to show a technical mistake in the description of the property, which was the only property the grantor had, and to justify a reformation of the instrument. *Idem.*

EMINENT DOMAIN

TO

ESTATES OF DECEDENTS

EMINENT DOMAIN.

Damages: Railways: Motive power. A corporation organized as a suburban railway company for the purpose of operating a street railway between certain cities and other points, reserving to itself the right to use horse power, electricity or such other power as may now or hereafter prove practicable or desirable, is not precluded from propelling its cars by steam; and in the condemnation of right of way the possibility of the use of steam power may be taken into consideration in estimating the damages to the land through which it runs. *Lewis v. Railway Co.*, 137.

Right of way: Damages. Where a corporation, organized with authority to construct and operate a railway, acquires a right of way under the statute granting power of eminent domain, the right to use the same is perpetual, at least so long as used as a right of way; and it is proper in estimating the damages to the land through which it runs to consider what effect the use of the land taken will have upon the value of the whole tract. *Idem.*

Notice of condemnation: Sufficiency. Notice to the sheriff to condemn a right of way for a suburban and interurban line, is broad enough to confer the right upon the company to operate its cars by steam; as suburban does not necessarily mean a railway operated otherwise than by steam. *Idem.*

ESTATES OF DECEDENTS. See WILLS.

Allowance to widow: Year's support. The allowance to a widow for her year's support is a matter within the sound discretion of the court, and its action will not be disturbed on appeal unless it is made to appear that such discretion has been abused. In the instant case an allowance of \$500 is upheld, where it appeared that the estate was worth \$10,000 above all debts, although the widow owned a small estate in her own right. *Rankin v. Rankin*, 488.

Claims: Withdrawal: Refiling. After filing his claim against the estate consisting of several items, claimant served notice of the claim upon the administrator, stating therein that all but two of the items were for the present withdrawn and would be withheld until the court passed upon his petition in another action, in which he claimed a conveyance of certain land in consideration of services covered by the withdrawn items, and that the other items would come on for trial. *Held*, that the withdrawn items

ESTATES OF DECEDENTS Continued

were not dismissed from the claim as filed, but even if they were, the estate remaining unsettled, claimant was entitled under the circumstances to refile the same by an amendment after disposition of the other action. *Black v. Miller*, 293.

Former adjudication: Estoppel. In a former action by decedent's children to partition certain real property, claimant pleaded an oral agreement with decedent to convey to him certain of the land in consideration for the care and support of decedent during his natural life. His claim as made in the action was dismissed as being without support in the evidence, and without any reservation whatever of his rights in the premises. *Held*, that the decree was an adjudication barring his right to recover on a claim against decedent's estate for the reasonable value of the same service. *Idem*.

Decent of property: Inheritance from adopted child: Statutes. Under the general inheritance statutes the heirs of an adopting parent, upon the death of an adopted child unmarried and without issue, would not inherit the property of such child, but the same would pass to the natural parents of the child. And even though by a recent statute, attempting to fix the relation between adopting parent and adopted child, and in effect a modification to some extent of the inheritance law, it should be held that an adopting parent may inherit from the adopted child, it does not provide that the heirs of such parent are heirs of such child; and the exception to the general statute will be strictly construed and given effect only to the extent of its positive provisions. *Baker v. Clowser*, 156.

Heirs: Listing. One related to a decedent simply by affinity is not an heir to his estate and need not be listed as such by the administrator. *Hatton v. Wheaton*, 460.

Premature discharge of administrator: Effect. The discharge of an administrator or executor before the expiration of a year from the date of the first publication of notice to creditors is not binding upon a creditor without notice thereof, and his right to file his claim during the year was not affected thereby; the statutory time for filing being merely suspended during the time of the premature discharge. *In re Kimball Estate*, 273.

Claims: Equitable relief. Where peculiar circumstances are shown entitling a claimant against an estate to equitable relief, the court has power to act in his behalf after the discharge of the administrator or executor. Thus where the executor, sole beneficiary under

ESTATES OF DECEDENTS Continued to **EVIDENCE**
the will, was prematurely discharged, the court had power to grant relief to a creditor of the estate who had no notice of the discharge, and who had not previously filed his claim. *Idem*.

ESTOPPEL. See **AGENCY—ESTATES OF DECEDENTS—MUNICIPAL CORPORATIONS—OFFICERS—REAL PROPERTY—SCHOOLS—TAXATION.**

EVIDENCE. IN CRIMINAL CASES, See **CRIMINAL LAW—See also FRAUD—INSTRUCTIONS—MORTGAGES—PARTITION—PHYSICIANS—WILLS.**

Admission of evidence. The rejection of evidence concerning a matter not in dispute was proper. *Buckeye Traction Ditcher Co. v. Smith*, 104.

Same: Prejudice. The striking out of evidence concerning a fact practically conceded upon the trial is not prejudicial. *Vernon v. Iowa State Traveling Men's Ass'n*, 597.

Examination of witnesses: Leading questions. Where it appeared from the answers of witnesses for the state that they were not led by the method of examination, the defendant could not complain that the questions were leading. *State v. Buford*, 173.

Experiments: Discretion. The question of making experiments in the presence of the jury is peculiarly within the discretion of the trial judge. In the instant case the court did not abuse its discretion in refusing the proffered testimony. *Boerner Fry Co. v. Mucci*, 315.

Hypothetical questions. Hypothetical questions put to an expert witness on his examination in chief must be based on what the testimony proves or tends to prove. *Adams v. Junger*, 449.

Materiality: Motion to strike. A motion to strike the entire answer of a witness because of immateriality, where a portion of the same was material, and no specific objection was made to the immaterial part, should be overruled. *Lee v. Henderman*, 719.

Same. In the absence of any preliminary showing that a witness had any knowledge of the occupation and character of the party inquired about, objection to the inquiry as to what the witness knew about such persons being a bootlegger was properly sustained as immaterial. *Idem*.

EVIDENCE Continued

Motion to strike. Where a substantial part of the evidence of a witness was proper a motion to strike his entire testimony should be overruled. *McDermott v. Association*, 544.

Communications with a decedent. The defendant in an action to quiet title and for an injunction was incompetent to testify to an oral agreement between himself and a deceased person, one of the grantees to whom the land in controversy was conveyed, and of whom plaintiff was the survivor, where the plaintiff did not testify concerning the agreement. *Davis v. Ritchey*, 388.

Confidential communications. The grantor of a party to an action involving real estate is incompetent under the statute to testify to personal transactions or communications with his deceased father, from whom he claimed an oral conveyance of the land; but the wife and son of the grantor are competent witnesses to communications between the husband and father, and his deceased grantor, for the purpose of establishing a parol conveyance, and in an action to which they were not parties. *Kerr v. Yager*, 69.

Same. Statements of deceased made to his wife and parents, both before and after he became a member of the association, concerning the condition of his health were privileged and therefore inadmissible. *Vernon v. Iowa State Traveling Men's Ass'n*, 597.

Declarations against interest: Admissions. Declarations or admissions of the adverse party may always be shown, whether written or made orally; and if in writing the other party may introduce all the correspondence on the subject. But generally self-serving declarations in whatever form are inadmissible; and the mere fact that a letter remains unanswered will not constitute an admission of the statements therein. In this action letters written by plaintiff to defendant after the sale, which were self-serving, were inadmissible; and unanswered letters written some time after he quit defendant's employ, and which were merely descriptive of past transactions, were not admissible to support a claim against defendant for salary and commissions. *SeEVERS v. Cleveland Coal Co.*, 574.

Same: Incompetent evidence: Waiver of objection. By introducing letters written to plaintiff, in response to letters from him improperly received in evidence, defendant did not waive its right to object to the incompetency of plaintiff's letters; since it was entitled to meet its case as best it could after introduction of the incompetent evidence. *Idem*.

EVIDENCE Continued

TO

FRAUD

Waiver of objections. An objection to evidence on specified grounds waives all other grounds of objection. *Kerr v. Yager*, 69.

Re-opening cause: Further evidence. The court has power to allow a witness to be heard for the purpose of correcting his testimony at any time before the issues are submitted to the jury, and even during the closing argument to the jury. *State v. Thomas*, 687.

EXECUTIONS. See PARTNERSHIP.

Execution sale: Action to cancel: Estoppel. An attempted redemption of land sold on execution, not shown to have been prejudicial to the execution creditor, will not estop him from maintaining an action to set aside the sale. *Manion v. Brady*, 306.

EXEMPTIONS.

Avails of life insurance. Under the statute the avails of life or accident insurance payable to the surviving widow are exempt from liability for debts contracted prior to the death of the husband. So that where the wife, after the death of her husband, signed a note given by him in his lifetime for family necessities, for which she was also liable, the signing of the note merely changed the evidence of her original indebtedness and created no new obligation, although the note provided for interest and attorney's fees; and property purchased with the insurance money was exempt from execution therefor. *Booth v. Martin*, 434.

FALSE REPRESENTATIONS. See FRAUD.

FENCES.

Partition fences: Construction of tight fence. Under the present statutes governing the building of partition fences, an owner who has made his portion of the fence tight can require the adjoining owner to construct his portion in a like tight manner, regardless of whether he uses his land for pasturing sheep and swine or for cultivation. *Mitchell v. Graver*, 188.

FOREIGN LAWS. See BONDS.

FORFEITURES. See REAL PROPERTY.

FRAUD.

False representations: Sale of land: Deficiency in acreage: Evidence. In this action for false representations as to the number

FRAUD Continued

of acres contained in the farm sold plaintiff, the evidence is reviewed and held to entitle plaintiff to recover, because of the fraud practiced both by defendant and his agent, regardless of whether the land was sold by the acre. *Day v. Merrick*, 287.

False representations of agent: Ratification. By accepting the benefits of the sale the owner of land ratifies the fraudulent representations of his authorized agent and is bound thereby; especially where he knew, as in this case, what the representations were. *Idem.*

Fraudulent conveyances: Accounting. Where the interest of the debtor in attached property consisted of a mere option to purchase land and was of no value to the creditor at the time of the attachment, unless he was willing to protect the option against immediate forfeiture by assuming the balance due on the purchase price, which he did not do and the contract was forfeited, an assignment of the contract by the debtor to another was not such a fraud upon the creditor as entitled him to an accounting from the assignee. *Tait v. Crissman*, 220.

Fraudulent conveyances: Evidence: Res gestae. In a suit by an heir to set aside a conveyance of his deceased ancestor, on the ground of the fraud of the grantee, proof of the declarations of the grantor at and immediately before the conveyance is competent as part of the *res gestae*, as bearing on the mental condition of the grantor; and all the facts and circumstances attending the transaction, including those bearing on the mental condition of grantor, and the influences exerted in bringing about the conveyance may be shown. *Curtis v. Armagast*, 507.

Same: Burden of proof: Constructive fraud: Confidential relation. One seeking to cancel a deed on the ground of actual fraud has the burden of proof on that issue; but in cases of constructive fraud, which is such fraud as the law infers from the relationship of the parties or the circumstances surrounding them, regardless of any dishonesty of purpose, the party claiming the benefit has the burden of rebutting the presumption which the law implies by proof that the contract was fairly procured, without undue influence or other impeaching circumstance; and this rule applies particularly where one of the parties by reason of the relationship has obtained a dominating influence over the other. *Idem.*

Same: Parent and child: Undue influence: Evidence. The conferring of benefits by a parent upon a child is presumptively valid; the presumption of invalidity in such cases only arises where the

FRAUD Continued

TO

GUARDIANSHIP

child has become the dominant personage in that relationship and the parent the dependent one. Thus where a son had been intrusted by his mother for many years with the management of practically her entire estate, and she had given him her savings for investment, lived with him and trusted him in everything, a conveyance of her real estate to him without consideration, or any agreement on his part to maintain her, was presumptively invalid, and the burden was upon the son to show that the conveyance was without undue influence and was the free, voluntary and intelligent act of the mother, as against her or those rightfully claiming through her. *Idem.*

Same: Trusts: Confidential relation: Evidence. In this action to set aside a voluntary conveyance from the mother to her son, the evidence is reviewed and held to show that the mother obtained the legal title to the land originally, free from any trust in favor of the son; that the conveyance from her to the son was not made in payment of any services rendered or for contributions to her support; and that the evidence is insufficient to overcome the presumption that the conveyance, owing to the confidential relation of the parties, was fraudulent and void. *Idem.*

FRAUDULENT CONVEYANCES. See **FRAUD.**

GARNISHMENT. See **ATTACHMENT—OFFICERS.**

GUARDIANSHIP.

Allowance of attorney's fees. The allowance of \$35 to an attorney appointed by the court to resist objections to the final report of a guardian for an incompetent, who was employed at least a day in the trial of the objections, was not excessive. In re Guardianship of Deck, 242.

Same: Where a temporary guardian has been appointed, followed by a permanent appointment, the expenses of guardianship, including expenses incurred by the guardian for attorney's fees in procuring the permanent appointment, should be paid from the ward's estate, and may be allowed in the guardianship proceedings. *Idem.*

Expenses of estate: Allowance. Where a temporary guardian has been obliged to employ counsel to get possession of his ward's property, and to maintain himself in office, he is entitled to an allowance for attorney's fees; and all expenses incurred in procuring an order for the preservation of the estate should be paid out of the estate. *Idem.*

GUARDIANSHIP Continued TO INSTRUCTIONS

Attorney's fees: Lien. While in the first instance counsel are generally employed by the applicant for the appointment of a permanent guardian, still where the appointment was contested an allowance of fees may be made to the guardian, where he afterward attended to the matter, and counsel made his claim against him and not against the applicant; and the attorney has an equitable lien for his services against funds of the estate recovered or preserved through his efforts. *Idem.*

HOMESTEAD.

Establishment: Occupancy. Merely sleeping in an uncompleted house is not sufficient occupancy to constitute a family homestead, where the act was not inconsistent with the purpose of having a temporary sleeping place, and the owner continued to pay rent for another house where he resided and got his meals, although he may have intended to complete the house and subsequently occupy it. *Gaston v. Horn*, 674.

INJUNCTION. See INTOXICATING LIQUORS.

INFANTS.

Contracts: Disaffirmance: Evidence. A minor is bound by his contracts regardless of whether he is under guardianship, unless he disaffirms within a reasonable time and returns the property received which is still in his possession, except in cases where the contract was obtained by misrepresentation of his age, or from having engaged in business as an adult and the other party had good reason to believe him capable of contracting. In the instant case the question of whether plaintiff had good reason to believe the minor capable of contracting was for the jury. *First National Bank v. Casey*, 349.

Evidence of minority. The appearance of a minor as a witness in an action to which he was a party, was a matter to be considered in determining whether from having engaged in business on his own account the other party to the contract had good reason to believe him a minor. *Idem.*

INSANITY. See INSURANCE.

INSTRUCTIONS. See AGENCY—CRIMINAL LAW—CONTRACTS—PHYSICIANS—NEGLIGENCE—WILLS.

Where the court submits a cause on the theory of a party as disclosed by his testimony, though the evidence may not be consistent

INSTRUCTIONS Continued

with his pleadings, he has no ground for complaint. *Boerner Fry Co. v. Mucci*, 315.

Refusal of requests. The refusal of requested instructions fairly covered by those given by the court is not erroneous. *Idem*.

Failure to separate issues. Where the buyer of goods, in defense to an action for the price, pleaded that they were bought by sample with which they did not comply, and also filed a counterclaim based upon the same breach of contract, he can not complain that the court in its instructions failed to separate the affirmative defense and the counterclaim. *Idem*.

Dismissal of issues. Where one count of a petition is dismissed during the trial the court may properly ignore the same in its instruction to the jury. *Hahn v. Lumpa*, 560.

Consideration of evidence. A jury must try a cause and base its verdict upon the evidence adduced. It is not proper for them to consider their own observation and experience with reference to the subject of the action, except in the matter of weighing the evidence submitted; and in a case where it was claimed that the stock were killed by lightning, an instruction of the trial court that the jury might properly consider their own observation and experience if any, with reference to losses of that nature was erroneous. *Downing v. Insurance Co.*, 1.

Duty of jury. It is the duty of the jury to follow an instruction of the court whether right or wrong. *Seevers v. Cleveland Coal Co.*, 574.

Harmless error. Where a division of a pleading was withdrawn during the trial and the attention of the jury was called to that fact, but in stating the issues the court by mistake included the same though he did not read it to the jury, and by oversight the instructions went to the jury without correction, omission to read that portion of the instruction, and a subsequent showing that the jury did not consider the same in making up their verdict, removed any possible prejudice. Moreover the instruction would not have been prejudicial if read to the jury; as the court specifically directed their attention to the issues in the main part of the charge and there made no reference to the withdrawn issue. *Vernon v. Iowa State Traveling Men's Ass'n*, 597.

Objection to sufficiency: Review. An objection that certain instructions were not sufficiently specific will not be entertained on appeal,

INSTRUCTIONS Continued TO INSURANCE

where there was no showing that the other instructions did not contain the desired specifications. *State v. Burns*, 440.

Preservation of exceptions. The statute authorizes the reporter to note in his report of the trial, in shorthand or in writing, the fact that the jury is instructed and all exceptions and objections to the instructions given by the court on its own motion, and this report when properly certified is sufficient evidence of the taking of exceptions to the instructions; but there is no authorized preservation of the record of exceptions by the mere certificates of the judge and reporter that they were taken. *Black v. Miller*, 293.

The trial judge in his instructions should clearly state the issues rather than copy the pleadings as a part thereof; and he should not assume the genuineness of decedent's signature to a note sought to be proven against his estate. *Idem*.

Refusal of requests. Refusal of a requested instruction fully covered by those given by the court is not reversible error. *State v. Young*, 647.

INSURANCE.

Adjustment of loss: By-law provision. The provision of a by-law of an insurance company that in case of the failure of the adjuster and insured to agree upon the amount of a loss and the liability of the company, the matter should be referred to the directors of the company for final adjustment, does not make a decision of the directors final; but the insured may appeal to the courts to determine the liability of the association. *Downing v. Insurance Co.*, 1.

Accident insurance: Permanent insanity: Evidence. In this action upon an accident policy of insurance, in which the association was exempted from liability for disability or death resulting from bodily or mental infirmity, the evidence is reviewed and held insufficient to support a finding that at the time the insured committed suicide he was actuated by a temporary insane impulse, but rather that his insanity was of a permanent character, and therefore an infirmity. *Layton v. Accident Co.*, 356.

Same: Contracts: Construction: Suicide: Stipulation against liability. Where an accident company undertakes to insure only against specified forms of accident, its contracts will be construed most strictly against it and it will be held to the strict letter

INSURANCE Continued

and spirit thereof; but a stipulation against liability for suicide, whether sane or insane, is competent and will be upheld. *Idem.*

Same: Suicide: Pleading: Issue. The question of whether insanity had any causative connection with the suicide of deceased was not in issue under an allegation that the suicide sprang from insanity, and was therefore not a question for the jury. *Idem.*

Accident insurance: Intoxication: Burden of proof. In an action on an accident insurance policy in which it was provided that the association should not be liable for injuries received by the insured when in an intoxicated condition, the burden was on the association to show such intoxication. *McDermott v. Association*, 544.

Same: Evidence. A non-expert may testify to the intoxicated condition of a person. Under the evidence the question of whether plaintiff was intoxicated at the time of the injury was for the jury. *Idem.*

Accident insurance: Evidence: Res gestae. In this action upon an accident policy, in which it was claimed that death resulted from blood poisoning due to an abrasion of the skin by means of a brush or other implement used by a bath attendant, the exhibition of the abrasion and the remark of deceased concerning his rough treatment while in the bathroom, made immediately following his bath, was admissible as *res gestae*. And subsequent declarations of present pain in the locality of the abrasion were also admissible as *res gestae*, and material as indicating the probable cause of death. *Vernon v. Iowa State Traveling Men's Ass'n*, 597.

Same: Cause of death: Burden of proof: Instructions. Where the by-laws of an accident association, providing that whenever a member in good standing dies within a certain time, the result solely of external, violent and accidental injury, are by reference made a part of the contract of insurance, the burden is upon the plaintiff to show that death resulted from such cause. But where the association claims that death resulted from one of the causes excepted by the contract, it has the burden on that issue. The instructions in this case are held to properly state the burden resting upon plaintiff to show that death was due solely to the accident, and did not result directly or indirectly in consequence of disease. *Idem.*

Same: Construction of Contract. The provision in an accident policy that there shall be no liability for an injury or death resulting in whole or in part, directly or indirectly, from disease,

INSURANCE Continued

etc., will be construed most strongly against the association; and will be held to apply only to such diseases, or bodily or mental infirmity, as in some manner contribute, directly or indirectly, either to the injury or death. *Idem.*

Same. The provision of an accident policy exempting the association from liability for death resulting directly or indirectly, wholly or in part, from medical or surgical treatment, is held to cover cases of accident growing out of such treatment, and not to apply to medical or surgical treatment necessitated by an accident. But in the instant case this defense was not available to the defendant because not pleaded. *Idem.*

Same: Refusal of instructions. Where the claimed accident was an abrasion of the skin by means of a brush used by a bath attendant, and, after properly defining the terms "accident" and "accidental," the court charged that plaintiff had the burden of showing that the accident as thus described caused the death, and that it must appear from a preponderance of the evidence that death was caused proximately and solely by external, violent and accidental means, the jury could not have returned a verdict for any other cause than that claimed; and refusal to instruct that plaintiff could not recover if death was caused by an operation to relieve deceased from a sore or boil on his limb was not prejudicial. *Idem.*

Cancellation of policy. A policy of insurance issued by authorized agents cannot, after delivery and payment of the premium to the agents, be cancelled by a mere direction of the company to the agents to obtain a better rate or take up and return the policy for cancellation; but in the absence of notice to the insured the policy is valid, and is not subject to cancellation by the agents without notice to the insured. *Waterloo Lumber Co. v. Des Moines Insurance Co.*, 563.

Cancellation and transfer of risk. The issuance and delivery of a policy of insurance by authorized agents in a stated sum, and payment to them of the premium, constitutes a completed contract; and thereafter the agents cease to represent the insured in any manner, and they cannot bind him by a subsequent cancellation of the policy and transfer of the risk to another company without his authority. *Idem.*

Same. An insurance company cannot relieve itself from liability on a valid policy of insurance for a loss already incurred, by induc-

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TO

INTOXICATING LIQUORS

ing the insured to accept a policy in another company issued without his authority, and affording no indemnity. *Idem.*

Same: Issuance of policy: Assent of assured. An agent authorized to issue policies and collect premiums has no authority to issue a policy covering property already destroyed; and a policy written by him in another company as a substitute for one then existing, but not brought to the notice or knowledge of the insured until after the loss, is not a valid contract, and will not work a cancellation of the first policy. *Idem.*

Same: Liability of insurer. It is essential to the validity of a policy of insurance, issued by another company as a substitute for one then existing, that the insured assent thereto; and where the assent was not procured until after the property was destroyed the insurer was not liable thereon. *Idem.*

Mutual benefit societies: Officers: Appointment: Tenure. Where the by-laws of a mutual benefit society provided for the appointment of supreme instructors by the supreme officer of the society, the appointments to be approved by a board of supreme managers, and that all officers and committees should be elected for the term of three years, the appointment and approval of supreme instructors in conformity therewith constituted such persons officers, who were entitled to hold their offices for the term of three years. *Kelley v. Royal Neighbors*, 547.

INTOXICATING LIQUORS.

Petition of consent: Signatures in certain cities. In cities of 2,500 and less than 5,000 a petition of consent to the sale of liquor signed by eighty per cent of the voters of the city, or by a majority of the voters of the city and township and sixty-five per cent of the voters of the county is sufficient. It is not necessary to have sixty-five per cent of the voters of the county sign the petition in addition to eighty per cent of those of such cities. *Theobald v. Flynn*, 360.

Injury by intoxicated person: Damages: Extent of proof. Under the statute providing that any child injured in his means of support by an intoxicated person has a right of action against the person who, by selling or giving away liquor, caused the intoxication, it is sufficient to show that the injury was by an intoxicated person regardless of whether it would have been committed by him if sober. *Lee v. Henderman*, 719.

INTOXICATING LIQUORS Continued

Instructions. In an action of this character, an instruction requiring plaintiff to prove that his injury in the means of his support was in consequence of such intoxication, while casting upon plaintiff a greater burden than the law requires, was not prejudicial to defendant. *Idem.*

Loss of support: Damages: Evidence. Evidence of the habits of plaintiff's father as to the use of liquor, and that he was a drunkard, while not a defense to an action by a child for loss of means of support by the sale or giving of liquor to him, is competent in determining plaintiff's loss. *Idem.*

Nuisance: Injunction: Abatement of action. A suit to enjoin a liquor nuisance may be instituted and maintained by any citizen of the county, and it will not be abated simply because plaintiff's attorney employed detectives, who were paid by an organization not incorporated in that county, to obtain evidence against defendant, and because plaintiff's attorney, a non-resident of the county, received the fees collected of defendants in that class of actions. *Reusch v. Loserth, 227.*

Same: Mulct saloon: Single room. A saloon room with a street entrance and a small addition on the rear opening into the main room, and used in connection therewith as a toilet room, and having an outside window large enough to admit a person, is not in compliance with the statute providing that the business shall be carried on in a single room, having but one entrance or exit. *Idem.*

Same: Use of furniture: Evidence. The evidence in this action is held to show that defendant violated the law by keeping a chair in the saloon room and permitting its use therein by a customer. *Idem.*

Taxation of costs. In the absence of a showing that a suit to restrain a liquor nuisance was brought maliciously and without probable cause the costs should not be taxed to plaintiff. *Idem.*

Single room. The keeping of a large refrigerator with an ice chest and adjoining storage room for beer, within a single room in which the retail liquor business was conducted, having a street opening for ice and a door from the ice chamber to the storage room, but which was nailed up, was not a violation of the statute requiring that a saloon shall be conducted in a single room with but one entrance. *Tuttle v. Carraher, 200.*

INTOXICATING LIQUORS Continued

Same: Employees: Listing of names. Draymen and carriers engaged in hauling liquors from a railway station or car and putting the same in a refrigerator in a saloon room are not persons employed about a saloon, who are required by statute to be listed with the county auditor, but are engaged in a separate employment having no connection with the saloon business. *Idem.*

Same: Intoxicated person: Evidence. The evidence in this action is held insufficient to show that defendant allowed an intoxicated person in his saloon, when in that condition; or to establish the charge that defendant failed to list an employee before he began work. *Idem.*

Illegal distribution: Place: Punishment. A corporation, though organized for a lawful purpose, which maintained a place in a public street walled off by canvas and used as a place for entertaining its guests, and there received and distributed intoxicating liquor to its members and guests, was guilty of violating the statute prohibiting the keeping or maintaining of a clubroom or other place in which liquors are received or kept for use, gift or sale; as the statute not only refers to a clubroom, but includes any place maintained for disbursing liquor; and a violation of the statute in such manner is punishable under the provisions of the Code relating to illegal sales, and the abatement of nuisances. *Shideler v. Tribe of the Sioux*, 417.

Same. The dispensing or distribution of intoxicating liquors among the members of an organization constitutes an illegal sale, within the meaning of Code section 2382, as amended, regardless of whether the same is done in any place. *Idem.*

Keeping of liquor. An organization which receives and immediately distributes intoxicating liquor among its guests is guilty of violating the statute. It is not necessary that there should be any permanent keeping. *Idem.*

Good faith distribution. Where an organization actually received and disbursed intoxicating liquors to its members and guests, it did the acts prohibited by the statute, and the question of its good faith or that of its guests is immaterial. It was also immaterial that there was no profit in the transaction, or that it was incidental to the main purpose of the organization. *Idem.*

Injunction: Abatement of nuisance. Where a corporation unlawfully distributed liquor among its members and guests, and its officers claimed the right and expressed the intention to continue to

INTOXICATING LIQUORS Continued to **LACHES**
do so, the evidence authorized an injunction restraining the further illegal acts of the corporation and its members actually participating therein. *Idem*.

INTOXICATION. See **INSURANCE**.

IRRIGATION BONDS. See **BONDS**.

JUDGMENTS. See **ESTATES OF DECEDENTS—PARTNERSHIP—REAL PROPERTY**.

Amendment. While a judgment may be amended to show facts different from those recited therein, this cannot be done in a collateral proceeding. *Lansing v. Bever Land Co.*, 693.

Decree of court: Ambiguity: Explanation. An ambiguity in a court decree may be explained by parol evidence. *Barthell v. Hermanson*, 329.

Former adjudication. A former decree quieting the title to property in the defendant's father, and a subsequent judgment against defendant in his action to set the decree aside, are conclusive against his claim to the property in subsequent litigation over the title to the property. *Davis v. Ritchey*, 388.

Mathematical error: Correction. A mere mathematical error in calculating the amount of a judgment can be cured on appeal by ordering a remittitur. *Bradley, Merriam & Smith v. Goetsche*, 77.

Counterclaim. Where the trial court properly directed the jury to credit the amount found due defendant on its two items of counterclaim against the sum found due plaintiff, it was not entitled to separate judgments on such items. *Seevers v. Cleveland Coal Co.*, 574.

JURISDICTION. See **APPEAL—COURTS**.

JURORS.

Bias: Knowledge of accused. The defendant in a criminal action cannot complain of the bias of a juror, where it is not shown that he or his counsel did not know of the matters complained of before the juror was sworn. *State v. Buford*, 173.

LACHES. See **LIMITATION OF ACTIONS**.

LANDLORD AND TENANT TO LIMITATION OF ACTIONS
LANDLORD AND TENANT.

Defective premises: Injury to tenant: Evidence. A landlord is not liable to a tenant for alleged injuries resulting from defective construction of the premises, where there was no concealment or misrepresentation concerning the same at the time of the lease; but where there was a stairway used by several tenants of the building, which remained in control of the landlord, he was bound to keep it in repair, and if he failed to do so and a tenant was injured in consequence of such neglect he was liable therefor. In the instant case plaintiff, a tenant, was injured by falling upon ice at the foot of an outside stairway to the building, used in common with other tenants and under the control of the landlord, and the questions of whether the proximate cause of the injury was the accumulation of the ice, and whether defendant had known of defects in the water pipes, from which the water was discharged onto the steps and froze, for such length of time as to require him in the exercise of reasonable care to remedy the same, were for the jury. *Morse v. Houghton*, 279.

LARCENY. See CRIMINAL LAW.

LIMITATION OF ACTIONS. See CONTRACTS.

Where a broker agreed with the purchaser of land to procure a loan for him at a stated rate of interest and to pay any sum in excess of that rate, the statute of limitations would not commence to run against a claim for the excess until it was paid by the purchaser. *Depugh v. Brown*, 165.

Action to cancel conveyance. An action in the courts of this state to cancel a conveyance of land located here on the ground of fraud, which conveyance was executed in a foreign state where both the grantor and grantee resided, is not barred by reason of the fact that some available remedy involving personal liability respecting the subject of the action was barred in the foreign jurisdiction, as such actions are of a distinct character; and as full relief could not be granted in a foreign jurisdiction the plaintiff was under no obligation to pursue the less effective remedy there, notwithstanding the provisions of Code Section 3452. *Curtis v. Armagast*, 507.

Same: Laches. An action to cancel a conveyance for fraud in its execution is not barred by laches, where the defendant was in no manner misled to his injury by the delay, and no equities had intervened. *Idem*.

LIMITATION OF ACTIONS Continued TO MARRIAGE AND DIVORCE

Suspension of statute. The running of the statute of limitations against a cause of action for the breach of a marriage contract is not suspended by the death of the promisor. In re Estate of Oldfield, 98.

MALICIOUS MISCHIEF. See CRIMINAL LAW.

MALICIOUS PROSECUTION.

Evidence. Where the plaintiff, in an action for malicious prosecution, was arrested and placed in jail, he may testify that he felt humiliated, mortified and disgraced by the accusation, arrest and prosecution for a crime of which he was not guilty. Lint v. Lint, 444.

Same: Probable cause: Instructions. An honest belief that plaintiff was guilty of the crime charged, based upon a knowledge of such facts and circumstances tending to show guilt as would lead a reasonably prudent man to believe plaintiff guilty of the crime charged, will authorize a finding of probable cause for the prosecution; and where the instructions construed as a whole announced the above rule, a single paragraph on the subject stating that probable cause means such a state of facts and circumstances as would lead a careful and conscientious man to believe that plaintiff was guilty of the crime charged, was not prejudicial, as casting upon defendant a higher degree of care than should be imposed. *Idem.*

MALPRACTICE. See PHYSICIANS.

MARRIAGE AND DIVORCE.

Cruelty. A divorce should not be granted the wife on the ground of cruel and inhuman treatment, consisting mainly of bitter and hateful language, where it appeared that the wife was guilty of like conduct, and she failed to show that the cruelty complained of endangered her life. Goeldner v. Goeldner, 415.

Dismissal of former action: Effect. Voluntary dismissal of an action for divorce and a return to the defendant will not bar the right to subsequently bring a similar action, nor prevent consideration in the later action of the entire life of the parties. *Idem.*

Divorce: Trial de novo: Cruel and inhumane treatment: Evidence. An action for divorce is triable anew in the appellate court

MARRIAGE AND DIVORCE Continued to **MORTGAGES**
on the record as made below; but where the evidence is in dispute, and the appearance and demeanor of the witnesses may have had some decisive effect on the decision of the presiding judge, the appellate court will be reluctant to disturb its finding. In this action for divorce on the ground of cruel and inhuman treatment the evidence is held to support the finding that the claims made by the plaintiff in her petition were substantially true. *Harris v. Harris*, 555.

MARSHALLING ASSETS. See **PARTNERSHIP**.

MASTER AND SERVANT. See **NEGLIGENCE**.

MIDDLEMAN. See **AGENCY**.

MISJOINDER OF CAUSES OF ACTION. See **ACTIONS**.

MISCONDUCT. See **NEW TRIAL**.

MORTGAGES. See **APPEAL**.

Absolute deed as a mortgage: Amount secured: Evidence. In this action to have a deed declared a mortgage securing a certain sum and no more, the evidence is reviewed and it is *held*; that the defendant bank held the deed to the land as security for the payment by it of certain judgments against plaintiff, as well as other indebtedness evidenced by certain notes, and that the bank had not been reimbursed, although the judgments were apparently discharged of record; the discharge having been for the purpose of allowing plaintiff to make a loan on the land, and not as evidence of payment in fact. *Cuthbertson v. First National Bank*, 144.

Negligence in execution: Evidence. Where the evidence tended to show that a broker, in the sale of land to plaintiff, agreed to procure for him a loan at a specified rate of interest and to pay any excess rate; that he directed plaintiff to another who made the loan in two notes and mortgages, one bearing the agreed rate and the other a higher rate, and that plaintiff did not read the notes and mortgages, but signed the same after the lender had read to him the mortgage bearing the lower rate. *Held*, that the question of whether plaintiff's negligence in signing the papers was such as to preclude his enforcement of the agreement with the broker was for the jury. *Depugh v. Brown*, 165.

Mortgage foreclosure: Jurisdiction. Where simply a judgment *in rem* was entered in a suit to foreclose a mortgage, the mortgagor

MORTGAGES Continued

being served outside the state, jurisdiction on appeal could not be conferred over a purchaser of part of the mortgaged premises, where such purchaser did not appeal, by an attempted appearance of counsel in his behalf. *Tukey v. Foster*, 311.

Conveyance of property: Liability of grantor and grantee. As between the grantor and grantee of property subject to a mortgage, which the grantee assumed and agreed to pay, the grantee became the principal debtor and the liability of the grantor secondary, while the liability of the property remains the same. *Boice v. Coffeen*, 705.

Same. Where property was conveyed subject to mortgage, which was assumed by the prior grantees but finally conveyed with full covenants of warranty, the rights of the original grantees to protection against primary liability for the mortgage debt were not affected by the latter conveyance with full covenants. And where a still later grantee acquired title by a special warranty deed, his rights, as against the mortgagee and a prior grantee who had assumed the mortgage, could be no greater than those of his grantor; and while he might be entitled to equitable relief against his grantor only, it would be without prejudice to pre-existing equities in favor of the mortgagee and a grantee who had assumed the mortgage. *Idem*.

Appeal: Right to object. Where a subsequent grantee was given judgment on a warranty against a prior grantor who had assumed a mortgage on the premises, but conveyed the property with full covenants of warranty, and the prior grantor had appealed, thus threatening the rights of the subsequent grantee under the decree, the plaintiff mortgagee could not object to an appeal by such subsequent grantee, that he might have the merits of his cross-petition tried anew. *Idem*.

Evidence: Best and secondary: Availability. In a suit to foreclose a mortgage against subsequent grantees who had assumed and agreed to pay the mortgage, the testimony of one defendant, respecting his conveyance of the property, that he conducted the transaction with his grantee personally, that he had no other transaction with him and executed but one deed, was sufficient to show that the deed was in the possession of his grantee, and to permit the introduction of the record in place of the original instrument; and even though introduced in support of the cross-petition of one of defendants, having been properly received, it was in evidence for all purposes and was available to the plaintiff. *Idem*.

MORTGAGES Continued TO MUNICIPAL CORPORATIONS

Collateral security: Surrender: Effect. Where the grantee of the mortgagor assumed the mortgage, and after giving collateral security for the debt transferred the property to another who also assumed the mortgage, the fact that the mortgagee returned the collateral security to the original grantee was not a matter of which the subsequent grantees could complain; as it did not affect their liability or that of the property as security for the debt. *Idem.*

Transfer of mortgage: Collusion: Extinguishment of debt. Where a grantee of land, who assumed an existing mortgage, conveyed to another who also assumed the mortgage, and thereafter conveyances were made with full covenants of warranty, the fact that the original grantee may have conclusively induced plaintiff to purchase the mortgage note for his protection did not prejudice the rights of a subsequent grantee under full covenants of warranty; and he was not therefore entitled to claim that the transaction constituted payment and discharge of the debt. *Idem.*

Endorsement without recourse. The fact that the assignment under the foregoing circumstances was without recourse did not affect the right of the assignee to maintain an action against the grantee who last assumed the mortgage, as the effect of the assignment without recourse was simply to protect the indorser. *Idem.*

Collateral security: Surrender: Effect. Collateral security for a mortgage debt, deposited by a grantee of the premises who assumed the mortgage, becomes secondary to the liability of a subsequent grantee who also assumed the debt; so that its surrender by the mortgagee was not prejudicial to the subsequent grantee. *Idem.*

MUNICIPAL CORPORATIONS.

Ordinances: Reasonableness. An ordinance requiring a railway company to construct and operate gates at a certain street crossing during all hours was not invalid, because imposing an unreasonable burden, even though for two and one-half hours out of the day no street cars were ordinarily operated over the street, and no pedestrians traveled the street at such time. *City of Council Bluffs v. Railway Co.*, 679.

Same: Railway crossings: Gate regulations: Statutes: Ordinances. An ordinance requiring gates at street crossings of steam and interurban railways, in accordance with the statute authorizing cities to require gates upon the public streets at railroad cross-

MUNICIPAL CORPORATIONS Continued

ings, and the statutes making interurban railways street railways within the city and subject to the same law, was not void because inconsistent with other provisions of the statutes regulating the method of crossing of steam and interurban electric railways; as the latter statutes relate to crossings outside the city limits. *Idem.*

Ordinances: Discrimination. An ordinance requiring railway companies to maintain gates at a street crossing, at the intersection of steam with an electric railway, was not objectionable as discriminating in favor of natural persons and against corporations; as the ordinance applied to either a corporation or an individual operating a railway at such crossing. *Idem.*

Construction of Ordinance. An ordinance requiring gates for the protection of the public at a street crossing, and at the intersection of a railroad with an electric line, was not objectionable as requiring a watchman as distinguished from an operator of the gates. *Idem.*

Ordinances: Title. The ordinance in this case was not objectionable as embracing more than one subject, and distinct matters not covered by the title. *Idem.*

Change of street grade: Recovery of damages. The right to recover damages for injury to property by reason of the alteration of the grade of a city street depends entirely upon statutory authority. *Chiesa & Co. v. City of Des Moines*, 343.

Change of street grade: Right of tenant to damages. Under the provisions of the Code requiring a city to pay the owner of abutting property any damages suffered by reason of a change in the grade of a street, a tenant for life or for a term of years may recover injury to leased property caused by such change; the word owner as used in the statute, when liberally construed, being broad enough to include a tenant for years. *Idem.*

Streets: Repair: Assessment of cost. A city has no authority to assess the cost of merely repairing a street against abutting property; but to bring the city within the statute and authorize an assessment for the cost, it must appear that the work proposed constitutes a reconstruction of the street improvement, as distinguished from a repair of the original construction. In the instant case the contemplated street improvement was a work of reconstruction, rather than of repair, and the city was authorized to

MUNICIPAL CORPORATIONS Continued

assess the cost against the abutting property. *Fuchs v. City of Cedar Rapids*, 392.

Special assessments; limitation of amount; estoppel. Where a city council refused the offer of petitioners for a street improvement to waive the statutory limitation of the amount of a special assessment, and proceeded to make the improvement on its own motion and regardless of the petition or consent of the property owners, the rejected offer could not be relied on as an estoppel against the property owners to insist on the statutory limitation of the amount of the assessment. *Bailey v. City of Des Moines*, 747.

Parol evidence: Impeachment of record. A city council cannot impeach its own record that a street improvement was ordered by the council on its own motion, without reference to any consent or petition of property owners, by parol evidence that the improvement was petitioned for and the petition was considered, but that it was customary, where three-fourths of the council were in favor of the improvement, to make the record show that the resolution was passed on the council's own motion for the purpose of avoiding possible defects in the petition. *Idem.*

Special assessment: Estoppel. The fact that the owner of property subject to special assessment was the city attorney and approved the form of contract for the improvement, would not estop his executrix from objecting to the assessment of his property on the ground that it exceeded the statutory limitation. *Idem.*

Excessive assessment: Burden of proof. Where a city attempts to assess property for a street improvement in excess of the statutory limitation, it has the burden of showing some ground upon which the limitation can be avoided; and a property owner is not chargeable with bad faith in resisting the excessive assessment. *Idem.*

Paving: Statute: Construction. The term paving as used in the statute authorizing a city to improve a street by curbing, guttering, paving, etc., contemplates that the work shall all be done as one improvement, where the street has not already been curbed and guttered; and it cannot treat the work as separate and independent items, making them the subject of contract and assessment to the extent of twenty-five per cent of the value of the abutting property in each instance. *Idem.*

MUNICIPAL CORPORATIONS Continued to**NEGLIGENCE**

Wharves: Fees. The right of a city to impose wharfage fees within its jurisdiction does not depend solely upon the expense it has incurred in the maintenance of the wharf; as the question of such expense is dependent largely on the condition of the water front. In the instant case, however, the evidence shows an improvement to some extent of the natural conditions. *Keckevoet v. City of Dubuque*, 631.

Municipal power: Unreasonable fees: Evidence. The imposition of reasonable wharfage fees by a city is a valid exercise of police power, and not an interference with interstate commerce; but this power cannot be used for the imposition of a tonnage tax, or a port wardens fee, or other ulterior purposes. *Idem*.

Enforcement of power: Issues. Although failure to pay the wharfage fees resulted simply in a demand by the city for a removal of house boats, and payment of the fees prevented their removal, the question of the reasonableness of the wharfage charges was properly before the court. *Idem*.

Same: Use of harbor: Discrimination. While a city has power to enact ordinances providing reasonable regulations for the use of a harbor, it cannot select some particular craft and prohibit its use of the harbor, except for some sound reason of public policy. *Idem*.

MURDER. See **CRIMINAL LAW**.

NEGLIGENCE. See **CARRIERS—PHYSICIANS—REAL PROPERTY**.

Automobile accident: Evidence. In an action for injury caused by the alleged negligent driving of an automobile by defendant, in which plaintiff claimed that the machine was driven against him, which was denied by defendant upon the trial, a letter written by defendant concerning the accident and containing statements from which it was admissible to prove the tr

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defendant was operating his machine at a rate of speed exceeding the lawful limit, the jury would be authorized to find defendant negligent, was objectionable as leaving the jury to exercise some discretion in finding negligence from such a state of facts. *Idem.*

Contributory negligence. Failure to plead freedom from contributory negligence in the original petition is cured by pleading the same in an amendment, even after verdict. *Jamison v. Myrtle Lodge*, 264.

Master and servant: Evidence. In this action for injury to an employee by reason of the failure of the rope on a car puller to slacken, evidence that the superintendent of defendant had on former occasions observed that the rope did not work satisfactorily and that it had been necessary to stop the machine on that account, which was not necessary to its proper operation, was admissible to show the defective condition of the machine, and also as bearing on defendant's negligence in failing to warn plaintiff of the danger. *Spencer v. Updike Grain Co.*, 31.

Same. Evidence of witnesses familiar with the operation of a car puller, that the clutch on the puller in question was so placed that in managing the rope on the drum plaintiff could not operate it without going around the machine, and if properly placed it would have been within reach and the machine could have been immediately stopped by plaintiff, was admissible. *Idem.*

Same: Prejudice: Review on appeal. Where the plaintiff's injury, though permanent, was not such as to affect his expectancy of life, the fact that his expectancy as shown was from a date prior to the trial a short time, rather than from the trial itself, was not prejudicial; and if there was any error in its admission it was cured by the instruction of the court. Besides no proper objection to the evidence in this regard was made at the trial. *Idem.*

Same: Failure to warn: Instruction. Where plaintiff's injury was the result of a defect in the machine with which he was at work, and not of any negligent act of his or of a co-employee in operating the same, submission of defendant's negligence in putting plaintiff to work without warning was proper. *Idem.*

Same: Assumption of risk. Where plaintiff was injured as the result of a defective machine which he was operating for the first time, and the defect was not known to him or obvious to an ordinary person without experience, and he did not know that it was

NEGLIGENCE Continued TO NEW TRIAL
unsuitable for the purpose and in the method in which it was being
used, he did not assume the risk of danger therefrom. *Idem.*

NEGOTIABLE INSTRUMENTS.

Consideration. Where notes were given for a debt then due, an agreement that they should also cover a prior and distinct indebtedness was invalid, because without consideration. *Cuthbertson v. First National Bank*, 144.

Genuineness of signature: Proof. Where the original note upon which an action is founded, or a copy thereof, is attached to the petition, the genuineness of the signature to the note will be presumed, unless denied under oath by the person whose signature it purports to be; but where neither the original nor a copy was attached to a claim filed against the estate, and all items of the claim were denied, the burden was upon claimant to establish the genuineness of the signature to the note before its admission in evidence. *Black v. Miller*, 293.

NEW TRIAL.

Argument of counsel: Misconduct. The conduct of attorneys in the course of their argument to the jury is peculiarly within the power and discretion of the trial court. In the instant case certain remarks of the prosecuting attorney in his closing argument are held to have been sufficiently dealt with by the sustaining of objections thereto. *State v. McKinnon*, 619.

Same. The conduct and actions of defendant in the presence of the jury, and while the complaining witness in a prosecution for rape was giving her testimony, may be the subject of fair and reasonable comment in argument to the jury, the propriety of which is peculiarly within the observation of the court. *Idem.*

Same. Whether the closing argument by the state was fairly responsive to that of counsel for defendant, even though beyond the record, is peculiarly a question for the trial court. *Idem.*

Same. The appellate court will not review alleged misconduct in argument to which no exception was taken upon the trial; it is only those matters specifically brought to the attention of the trial court in some proper manner that will be considered. *Idem.*

Same. Where the defendant did not ask for a new trial on the ground that the prosecuting attorney in his closing argument referred to

NEW TRIAL Continued **TO** **OFFICERS**
 the fact that he did not take the stand in his own defense, the question of whether such statement was a violation of the statute prohibiting such a reference was not for consideration on appeal. *Idem.*

Discretion: Review on appeal. Trial courts have a large discretion in the matter of granting new trials, which must be exercised, however, with care and judgment, and in the light of all the facts and circumstances of each particular case; but unless it fairly appears that there has been an abuse of that discretion the action of the trial court in granting a new trial will not be interfered with on appeal. *Post v. City of Dubuque*, 224.

Misconduct in argument Even an indirect reference by counsel for the state that defendant, in a criminal case, did not take the stand in his own behalf, is a violation of the statute and should not be made. *State v. Hector*, 664.

Misconduct in argument. The improper remark of plaintiff's counsel in his closing argument, that defendant had brought a large number of unnecessary witnesses and that the costs would amount to several hundred dollars, and for that reason a verdict should be returned for plaintiff, did not require a reversal, where, upon objection counsel withdrew the remark, though still insisting that large costs had been needlessly incurred, and the court immediately directed the jury not to consider anything that had been said about costs. *Thompson v. Railway Co.*, 235.

NUISANCE. See INTOXICATING LIQUORS.

OFFICERS.

Sheriffs: Liability for acts of deputy. A sheriff is responsible for the acts of his deputy in failing to preserve or turn over to the clerk of the court property or funds coming into his hands as the result of garnishment proceedings. *Gutschenritter v. Whitmore*, 252.

Garnishment: Return of deposit. A sheriff is liable for the wrongful act of his deputy in returning to the garnishee a bank draft deposited with him by the garnishee to cover his liability to the defendant, even though a personal judgment was thereafter rendered against the garnishee by reason of its return. *Idem.*

Action against sheriff: Demand. The fact that the garnishee had left the state was a sufficient showing that the judgment against

OFFICERS Continued**TO****ORIGINAL NOTICE**

him was not collectible to render the sheriff liable for the wrongful return to the garnishee of the amount deposited with the deputy. And where it appeared that the deposit had been returned to the garnishee, it was not necessary to make a demand on the sheriff for the same before bringing suit against him and his bond for the wrongful act. *Idem.*

Acceptance of draft in lieu of cash: Presumption: Estoppel. A sheriff is not bound to accept from a garnishee a check or draft in discharge of his liability to the defendant, but having done so he is in no position to complain that the amount was not in cash; as it will be presumed in the absence of a contrary showing that the draft would have been cashed if presented. *Idem.*

Duty of sheriff: Knowledge of garnishee: Conditional payment. A garnishee is chargeable with knowledge of the statutory duties of a sheriff, with respect to the disposition of the amount paid him in discharging the obligation of the garnishee to the defendant; and in paying the amount to the sheriff he can impose on him no condition with reference to the disposition of the fund calculated to deter the sheriff in the performance of his legal duty. *Idem.*

Duty of sheriff. In garnishment proceedings the sheriff acts in a ministerial capacity and his relation to the plaintiff is like that of agent; and he can make no arrangement or agreement with the defendant or garnishee, respecting the fund garnisheed, inimical to the interests of the plaintiff. *Idem.*

ORIGINAL NOTICE.

Non-resident: Service by publication. The statutes conferring jurisdiction to render a judgment against a non-resident defendant served by publication only, must be strictly and literally complied with, or the judgment and all subsequent proceedings will be void. *Manion v. Brady*, 306.

Same: Affidavit for publication of notice. The affidavit that personal service of the original notice cannot be had on defendant in this state must be filed before publication of the notice. *Idem.*

Service by publication: Proof of publication. The publication of an original notice for the commencement of an action must be for four consecutive weeks, either before or after filing the petition; and where the proof of publication showed on its face that it was not so published, and failed to show that it was made by the publisher of the paper or by his foreman, as required by the statute, it was fatally defective, and could not be cured by parol evidence. *Idem.*

PARENT AND CHILD TO PARTNERSHIP
PARENT AND CHILD. See FRAUD.

PARTIES. See APPEAL.

PARTITION.

Adverse possession: Burden of proof: Evidence. The defendant in partition proceedings, who claims the land by virtue of an oral transfer followed by possession for the statutory period, has the burden of proof on that issue. In the instant case the evidence is held to show that a parol conveyance was made to defendant's grantor, in consideration for past services and an agreement to pay the taxes on the land. *Kerr v. Yager*, 69.

Evidence of value. Evidence that land contiguous to that appraised in partition proceedings, and similar in quality, was subsequently sold for more than the land in question was appraised, was not conclusive that the appraisal was too low. *Rice v. Rice*, 128.

Where simply partition of real estate in kind is asked the plaintiff is not entitled to an order directing a sale and partition of the proceeds, especially where the purpose was simply to have the property offered for sale to establish a price. *Idem*.

Stipulation as to rent: Effect. An agreement of the parties to a partition proceeding made pending an appeal that each should have possession without rent of the land decreed to them disposed of that question, and the plaintiff was not thereafter entitled to rent from the defendant for the land decreed to him, although the stipulation did not specifically refer to such lands. *Idem*.

Apportionment of costs. Where the plaintiff in partition secured a more favorable division of the costs than he was entitled to, because of an erroneous taxation of attorney's fees to the defendant, he could not complain although the defendant did not appeal. *Idem*.

Constitutional law: Due process. An erroneous decree in partition proceedings depriving a party of a portion of his land is not necessarily a taking of property without due process, within the meaning of the constitution. *Idem*.

PARTNERSHIP.

A partnership is a distinct entity, and a judgment against it is not a judgment against the individual members of the firm. *Lansing v. Bever Land Co.*, 693.

PARTNERSHIP Continued

Execution: Description of defendant: Levy. Where the defendant named in an execution appears to be a partnership, a partnership will be inferred, as the defendant need not be so designated in the writ; and where that is the only recital descriptive of the judgment defendant, a levy on the individual property of a member of the firm is unauthorized. *Idem.*

Action against partnership: Appearance of partners individually. The fact that individual partners, on the trial of a counterclaim filed in an action brought by the partnership, employed counsel, gave evidence and advised and assisted in the defense of the counterclaim, was not such a personal appearance to the action as to bind them individually by the judgment; as these were matters which they might have done as agents of the firm. And the same rule obtains where the partners were named as parties and not served with notice. *Idem.*

Accounting. In this action for an accounting between partners, the evidence is reviewed and held to show that plaintiff had an interest in the profits on a sale of horses; and to support a finding that there was a partnership relation entitling him to an accounting. *Olson v. Michener*, 338.

Marshalling of assets: Rights of creditors. In equity partnership property constitutes a fund for the payment of partnership debts, the separate property of the partners being liable for their individual debts; and individual creditors cannot look to firm property until the firm debts are paid, and firm creditors cannot look to individual property until the individual debts are paid. So that where a creditor of a partnership and also of one of the partners received funds of both the firm and the individual, a co-partner had the right to insist that the firm funds should be first applied to the firm debts; especially that portion received after knowledge by the creditor that he was receiving firm funds, and that no part of the funds received should be applied on the debt of the partner, except payments made from his individual funds. *Hirsch, Wickwire Co. v. Denison Clothing Co.*, 117.

Misappropriation of funds: Ratification: Evidence. One partner cannot pledge the property of the firm to secure the payment of his own debts, without the knowledge or consent of the other partner; and if he does so the party receiving the same is liable to the co-partnership therefor, unless the injured party has ratified the act. In the instant case one partner upon settlement and dissolution of the firm received all of the firm's assets, paying nothing to his co-partner at the time, but upon settlement it was

PARTNERSHIP Continued

TO

PHYSICIAN

found that the co-partner was indebted to him after allowing everything he was entitled to. *Held*, that there was no sufficient proof of ratification, and that he was entitled to recover against a creditor of the co-partner for firm funds misappropriated to the payment of his individual debt. *Wile, Weill & Co. v. Denison Clothing Co.*, 109.

PHYSICIAN.

Malpractice: Contradictory instructions. Where the court, in an action for malpractice, took from the jury all questions as to negligence of defendant in the treatment of the injury, and told them that there was no evidence that failure of the broken bones to unite, or that the condition of the limb or of the fracture, was due to any negligence or want of skill on the part of defendant, subsequent instructions in which the court submitted the question of defendant's skill in diagnosing the injury and in allowing the fractured part of the bones to remain in the flesh, producing bodily pain and mental suffering, and also authorizing the jury to award damages for pain and suffering during defendant's treatment of plaintiff, were contradictory and conflicting. *Adams v. Junger*, 449.

Same: Negligence: Evidence. In this action for malpractice the evidence is reviewed and held insufficient to authorize submission to the jury of the question of defendant's negligence in his original treatment of the injury, or in the use of appliances. *Idem*.

Same: Instructions. Where an action for malpractice was tried on the theory of negligence in failing to discover a fractured bone protruding into the flesh and causing pain, instructions that there was no evidence of failure of the bones to unite or that the condition of the injury was due to negligence of defendant, and that if defendant did not use reasonable skill in diagnosing the injury and allowed fractured bones to remain in the flesh, did not present the case as tried in a manner to be understood by the jury. *Idem*.

Same: Evidence. The evidence in this action is also reviewed and held insufficient to authorize submission of defendant's negligence in failing to discover a fractured bone protruding into the flesh, and in not preventing the pain resulting therefrom. *Idem*.

Evidence: Non-experts: Harmless error. A non-expert witness is not competent to testify in an action for malpractice that plaintiff suffered pain, or that she was afflicted with a certain disease; but where defendant treated plaintiff for rheumatic pains his testimony that she suffered such pain was harmless. *Idem*.

PHYSICIAN Continued

TO

RAILROADS

Same: Negligence: Recovery: Instruction. In this action for malpractice, tried upon the theory that defendant was negligent in not discovering that a fractured bone protruded into the flesh, and in not relieving the pain resulting therefrom, plaintiff could not recover unless there was evidence that such condition existed during the time of defendant's employment, and prior to an operation by another. *Idem.*

PLEADINGS. See CARRIERS—CONTRACTS—INSURANCE—REAL PROPERTY—SALES.

Separate counts: Insufficiency of one. Where there are two counts of a pleading, setting up the same cause of action on slightly different legal theories, one of which presents a good cause of action, the insufficiency of the other count becomes immaterial. *School Township of Eden v. Stevens*, 119.

POLICE COURTS. See COURTS.

PRACTICE. See APPEAL.

Continuance of cause: Discretion. The trial court has a discretion in the matter of granting a continuance; and where the motion for continuance was for the purpose of obtaining testimony from a foreign state, and the pleadings to which it was applicable had been on file for some time, and there was no showing why the desired evidence had not been taken, a denial of the motion was not an abuse of such discretion. *Davis v. Ritchey*, 388.

PRINCIPAL AND AGENT. See AGENCY.

RAILROADS. See CARRIERS—EMINENT DOMAIN—STATUTES.

Crossing gates: Defenses. It is no defense to an action to compel a railway company to erect and maintain crossing gates at the intersection with a street railway, that the ordinance also required the street railway to maintain gates at the same crossing, and that it had not complied therewith. *City of Council Bluffs v. Railway Co.*, 679.

Mandamus. Mandamus is the proper remedy to compel a railway company to comply with an ordinance requiring the construction and maintenance of gates at street intersections. *Idem.*

Operation: Scope of power. It is the purpose for which a railway company is organized as expressed in the body of its charter, rather

RAILROADS Continued

TO

REAL PROPERTY

than its name, which governs the extent of its power; and while a street railway ordinarily is one authorized to use the streets of a city or town under a charter from the municipality, yet if it assumes in its articles the further power to own and operate other railways, and reserves the right to designate the power by which they shall be operated, it becomes a railway corporation in the broad sense of the term, and may determine the motive power to be used in operating its cars. *Lewis v. Railway Co.*, 137.

RAPE. See CRIMINAL LAW.

RATIFICATION. See AGENCY.

REAL PROPERTY.

Boundaries: Street lines: Change: Burden of proof. Where a street line was conceded to be lost and was without visible monuments, and the abutting owner had held the undisputed possession up to the line claimed by him for a long series of years, which line corresponded with other lot lines in the direction in which it extended, the burden was upon the town, in an action to enjoin a change in the line, to show that the boundary as claimed by the abutting owner was incorrect. *Bridges v. Town of Grand View*, 402.

Same: Adverse possession: Estoppel. While an abutting owner cannot by limitations acquire part of the street adversely to the municipality, still the municipality may estop itself by the acts of its officers and citizens from claiming that the street extends beyond a given line, although the same may not be the true line. *Idem.*

Same: Change of boundary: Evidence. In this action by an abutting owner to restrain the town from changing the line of the street, the evidence is reviewed and held insufficient to show that the line claimed by plaintiff was not the true line. *Idem.*

Same: Estoppel. Acquiescence by a municipality for a long series of years in the erection and maintenance of houses, sidewalks, fences and the general improvement of abutting property with respect to a given line corresponding to a similar line of an adjoining block, and the removal of such part of the improvements as would permit the establishment of the line as contended for by the city would render the premises unsightly, and in fact destroy and leave a portion of the improvements in the street, would estop the city from establishing another line as the true line. *Idem.*

REAL PROPERTY Continued

Contract affecting real property: Option: Estoppel. Where an agreement respecting the sale of real estate amounts simply to an option to purchase and not a contract of sale, failure to make payments as provided therein is an abandonment of all further rights thereunder; and the serving of notice of forfeiture after the breach would not amount to an estoppel of the right to rely on the contention that the instrument was merely an option. The agreement in this case is held to have been merely an option. *Low v. Mul-larky & Long*, 15.

Same: Notice of forfeiture: Sufficiency. A notice of forfeiture of a contract providing that if plaintiff should fail to fulfill the terms of said contract, specifying the amount due, a forfeiture would be declared was sufficient, even though the amount specified was to be paid partly in cash and partly by assumption of a mortgage on the premises; as the requirement of the vendee was to fulfill the terms of the contract. And it was not insufficient on the ground that it was a mere threat to declare a forfeiture; as the statute merely requires that the notice shall be a declaration of intention to forfeit the contract. *Gaston v. Horn*, 674.

Contracts: Assignment: Effect. A vendor's interest in a contract for the sale of land is assignable; and its assignment carries with it and vests in the assignee all of the rights of the assignor, including the right of forfeiture. *Tait v. Reid*, 466.

Forfeitures: Burden of proof: Evidence. Forfeitures are not favored in law; and the party seeking to enforce a forfeiture has the burden of proving such facts as, under the terms of the contract, will entitle him thereto. *Idem*.

Forfeiture: Evidence. Default in the payment of taxes, failure to make payments provided in the contract promptly and to perform conditions regarding insurance, existing at the time notice of forfeiture was served, will authorize enforcement of a forfeiture provision, either at the suit of the vendor or his assignee. *Idem*.

Waiver. Where the assignee of the vendor's interest in a land contract diligently notified the purchaser of his default, and that strict performance would be insisted upon, he did not waive his right of forfeiture by refusing partial performance. *Idem*.

Co-tenants: Ouster. A co-tenant in possession, basing his claim to the entire property solely upon improvements made upon the property, cannot invoke the statute of limitations against another

REAL PROPERTY Continued

co-tenant who did not know that the improvements were made under a hostile claim. *Baker v. Clowser*, 156.

Easements by implication. The devisees of property take title by purchase, and so far as easements are concerned their rights are the same as those of any other purchaser. So that where a building was devised to different parties, in one part of which and adjoining the dividing line there was a stairway and hall designed and used for the mutual convenience of the occupants of the entire building, the grantees of the part adjoining the stairway and hall acquired an easement therein by implication, and the grantees of the other part took title subject to such easement. *Kane v. Templin*, 24.

Same. Easements by implication are limited to such rights as in the nature of the case must be presumed to have been in the minds of the parties concerned, appurtenant on the one hand and servient on the other; and necessity for the convenient use and enjoyment of the premises to which the easement is claimed to be appurtenant is material in determining whether the easement is to be implied. *Idem*.

Same. An appurtenant easement passes with a description of the property to which it attaches without specific designation; and the purchaser of the servient property takes subject to the easement, without express reservation. *Idem*.

Same: Judgments: Conclusiveness. A decree reforming a will so as to correctly describe that part of a building devised to one legatee will not bar the right of the legatee of the other part to subsequently sue for the protection of an easement appurtenant thereto. *Idem*.

Same: Abandonment: Evidence. Mere non-user of an easement during a time when there was no occasion to use it does not show permanent abandonment. In the instant case the evidence is held insufficient to show abandonment. *Idem*.

Excavation: Liability for injury to adjoining land. In making an excavation of earth close to the boundary line of adjoining land, reasonable precaution must be taken to prevent the neighbor's soil from falling, and if this has been done and the soil falls of its own weight and pressure liability for injury to the land alone attaches; if, however, it falls solely from the weight of the superstructure, no liability attaches for injury either to the soil or the superstructure. But if the adjoining land sinks and falls by rea-

REAL PROPERTY Continued

son of the negligent manner in which the excavation was made, liability for injury to both the soil and superstructure follows. *Jamison v. Myrtle Lodge*, 264.

Same: Negligence: Evidence. In this action for injury to adjoining property caused by an excavation, the evidence is held to require a submission of the question of defendant's negligence in failing to adequately support the ground of the adjoining owner, and to support a finding that the soil fell from its own weight and pressure and not from the weight of the superstructure. *Idem*.

Same: Contributory negligence: Pleadings. The owner of property is required to exercise reasonable care to preserve his building from injury by reason of the excavation of the adjoining lot; and, in suing for damages on account thereof must plead and prove freedom from contributory negligence. *Idem*.

Same: Removal of lateral support: Notice. Where the owner of a building occupied the same while the work of excavating the adjoining lot progressed and he knew of the work, he was not entitled to notice of what was being done. *Idem*.

Use and occupation: Prima facie case. To establish a claim for the use and occupation of decedent's land, it is not necessary for the administrator to show that there was a mutual understanding that decedent was to receive pay for the use of the land. Proof that the occupant entered upon the land, used and occupied it for his own benefit, with the assent of decedent, implies a promise to pay the reasonable value of the use, in the absence of proof that the use had been paid for or that it was gratuitous; and such defense must be pleaded to be available. *Black v. Miller*, 293.

Same. The rule with respect to the rendition of services by a relative living in the family has no application to a claim against an occupant of decedent's land for its use while decedent was living with and being supported by the occupant. *Idem*.

Vendor and vendee: Objections to title: Waiver. Where a purchaser of land objected to the vendor's title on specific grounds, he cannot change his grounds of objection when the contract is sought to be enforced. *Condit v. Johnson*, 209.

Vendor and vendee: Reservation of life use: Evidence. In this action to obtain possession of real property, the evidence is reviewed and held to sustain a finding that a purchaser of the land, in having the conveyance taken in the name of another,

REAL PROPERTY Continued **TO** **SALES**
made an agreement with the grantee that he should have the life use and occupancy of the premises. *John v. Penegar*, 366.

Same: Good faith purchaser: Notice. A purchaser of land who knew that the same was and had been in the possession of another for a long series of years, and that the grantor had never occupied the same, and who was told that he had better consult the occupant of the premises, was put on inquiry as to the rights of the occupant and took the title subject thereto. *Idem.*

REFORMATION OF INSTRUMENTS. See **EQUITY.**

REMAINDER. See **WILLS.**

SALES.

Action for the price: Issues: Instructions. In an action for goods sold and delivered, in which the buyer claimed they were bought by sample and that they were not of the same quality, submission of the case on that theory was sufficient, over the objection that the instructions ignored the charge of false representations and worthlessness of the goods; since if they were not according to sample it was immaterial whether defendant charged false representations in that respect, or breach of warranty. *Boerner Fry Co. v. Mucci*, 315.

Evidence. Where the buyer in an action for the price of goods pleaded the worthlessness of the same, it was within the discretion of the court to permit the seller to show in a general way the extent of his sales of the article. *Idem.*

Approval on trial: Rejection. Under a contract to pay cash for a ditching machine on the trial of the same, the purchaser was not bound to accept the machine if it would not do the work for which it was purchased; but as the sale was conditional simply on the ability of the machine to do the work no right of rejection by the purchaser existed on the mere ground of dissatisfaction. *Buckeye Traction Ditcher Co. v. Smith*, 104.

Pleadings: Evidence: Prejudice. Where the plaintiff in an action for the price of a machine pleaded a specific contract and also the reasonable value; but on the trial the rights of the parties were made to turn solely on the question of whether there had been an acceptance, admission of evidence of the reasonable value, though erroneous, was not prejudicial. *Idem.*

SALES Continued

Counterclaim: Evidence. Where the jury found that there had been an acceptance of the machine by the purchaser, refusal to permit him to show the amount of freight paid under his counterclaim to an action for the price was not prejudicial. *Idem.*

Action for price: Evidence. Where there was an acceptance of a machine by the purchaser, exclusion of evidence that the authorized agent of the seller stated at the time of acceptance that if it did not do the work he need not keep it, was immaterial and without prejudice. *Idem.*

Test: Acceptance: Presumption. Where machinery is purchased subject to test the purchaser is entitled to a reasonable time in which to make the test before he can be required to accept, but he is bound to make the test within such time; and if he fails to do so the law will presume an acceptance. *Idem.*

Breach: Remedies: Action for price: Condition precedent. Where the purchaser of goods has repudiated his completed contract the seller may select either of three remedies; he may hold the property for the vendee and sue for the price, or he may keep it as his own and sue for the difference between the market value and the contract price, or he may sell the property for the highest price he can obtain and sue for the balance of the purchase price. Where he elects to rely upon the contract and sue for the purchase price he must fully perform on his part, and failure to set apart the goods for the purchaser, or to deliver or tender the same, will defeat recovery; and the necessity of performance in this respect is not obviated by a notice from the purchaser that he would not accept the goods, and that shipment would be at the seller's risk. *Pate v. Ralston*, 411.

Contract: Breach. Under a jobber's contract for the exclusive sale of machinery for a certain time and in certain territory, the machinery to be furnished as listed, and the jobber to use good business methods to effect sales, and in view of the evidence that both parties knew it was customary to take orders for future delivery, and that canvassing the territory was the proper method of procuring trade in that line of business, refusal to furnish machinery for which orders were taken during the life of the contract but to be delivered thereafter, was a breach of the contract. *Portable Elevator Mfg. Co. v. Bradley, Merriam & Smith*, 19.

Same: Measure of damages. Where it appeared that the expense of substituting other machinery for that sold, caused by defendants' breach of the contract to furnish the same, was as great as that

SALES Continued

TO

SCHOOLS

incurred in procuring the original orders, the plaintiff was entitled to recover as damages the profits that would have accrued from filling the original orders; and where the amount allowed was less than the proper measure of damages there was no prejudice to the defendant in awarding the expense of obtaining the orders. *Idem.*

SCHOOLS.

Corporal punishment: Instructions. An instruction requiring the jury to find whether the degree of impudence and defiance of a pupil was the violation of a reasonable rule of discipline in the school, was not objectionable as requiring a finding as to what was a reasonable regulation, and whether it was reasonable to forbid saucy and impudent conduct. *State v. Davis*, 501.

Same: Evidence of custom: Instruction. Where the defendant upon the trial of the action denied that he punished a pupil for refusal to perform a certain act, but based the punishment solely upon saucy and impudent conduct in refusing to so perform, exclusion of evidence that it had been the custom to require performance of the act of the older children was not prejudicial. And the ruling excluding the evidence was not rendered erroneous by the subsequent instruction that if defendant as a reasonable man believed that he had the right to require performance of the act, and in that belief inflicted the punishment because of the refusal, he would be guilty of assault and battery; as the instruction was more favorable to defendant than he was entitled to. *Idem.*

Liability for loss of township funds. There is no liability on the bond of a school township treasurer providing that he shall "exercise all reasonable diligence and care in the preservation and lawful disposal of all money," for the loss of funds occurring through the failure of a bank in which they were deposited, in the absence of a showing of negligence of the treasurer in selecting the depository. *School Township of Eden v. Stevens*, 119.

Payment of warrants by treasurer from own funds: Recovery. Where a school township treasurer expecting to be reimbursed paid warrants from his individual funds, at a time when the public funds were rendered unavailable by the closing of the bank in which they were deposited, he was entitled to recover therefor from the township, when through insolvency of the bank the funds were lost. *Idem.*

Same: Estoppel. The fact that a school township treasurer rendered annual statements in which funds tied up in an insolvent

SCHOOLS Continued **TO** **SOLDIERS' RELIEF FUND**
 bank were treated as moneys on hand, did not estop him from claiming reimbursement for warrants paid from his own funds, where the facts were fully understood and it was expected that a portion of the funds in the bank would be available to the township. *Idem.*

SEDUCTION. See **CRIMINAL LAW.**

SHERIFFS. See **OFFICERS.**

SLANDER AND LIBEL.

Words actionable per se: Innuendo. Words which are slanderous in themselves do not require the allegation of an *innuendo* to explain their meaning; and even if not necessarily slanderous *per se*, still if used in a connection clearly rendering them such no *innuendo* need be alleged. Besides, the objection that no *innuendo* was pleaded cannot be first raised on appeal. *Hahn v. Lumpa*, 560.

Same: Mitigation: Instructions. Matters relied upon in mitigation of an alleged slanderous charge must be distinctly pleaded in a separate division of the answer; and in the absence of such a plea the instruction that if the words were spoken in the defamatory sense charged anger would be no defense, nor serve to mitigate the offense, was proper. *Idem.*

Same: Damages: Evidence. The defendant's pecuniary condition may be shown in an action for slander. In the instant case a judgment for \$500 was not excessive. *Idem.*

SOLDIERS' RELIEF FUND.

Disbursement of funds: Commission. The statutes providing a fund for the burial of indigent soldiers, and its distribution through a soldiers' relief commission consisting of three persons, two of whom shall be honorably discharged Union soldiers, sailors or marines, contemplate the appointment of veterans of the Civil War between the states in preference to veterans of the Spanish War. *Keely v. Supervisors*, 205.

Relief commission: Appointment: Quo warranto. Quo warranto is the proper remedy for testing the act of county supervisors, where it is claimed that they have improperly appointed a veteran of the Spanish War as a member of the soldiers' relief commission, when the statute gives a preference to veterans of the Civil War. *Idem.*

SPECIAL ASSESSMENTS TO **STATUTES**
SPECIAL ASSESSMENTS. See **CORPORATIONS.**

SPECIFIC PERFORMANCE. See **EQUITY.**

STATUTES. See **BONDS—COURTS.**

Liberal construction. The rule that statutes in derogation of the common law shall be strictly construed does not obtain in this state, as it is expressly provided therein that all proceedings thereunder shall be given a liberal construction to promote their objects and to assist parties in obtaining justice. *Chiesa & Co. v. City of Des Moines*, 343.

Definition of terms: Free pass. The legislature has power to incorporate in an enactment itself a definition of some of the terms used therein, when within the fair range of definition. Thus in the statute prohibiting railway companies from giving free passes, it was competent for the legislature to define therein the term free pass, as any transportation for any other consideration than money at a rate open to all persons alike; as the same is in no sense expository legislation, or retrospective and *ex post facto*. *Schultz v. Parker*, 42.

Same. It was proper for the legislature to declare by interpretation of the term free pass, as used in the statute, that it was not so used in its literal and absolute sense, but rather in a sense sufficiently broad as to give effectiveness to the legislation, by including within the prohibition the giving of transportation for an inadequate and discriminatory consideration, either in money or services. *Idem*.

Title. A legislative act entitled "An Act to prohibit carriers of passengers from issuing, furnishing or giving free tickets, free passes, free transportation or discriminating reduced rates," except to certain described employees; to prohibit the acceptance or use thereof, except by such persons, and providing a penalty for a violation of the Act, was sufficient to indicate that the prohibition of the Act went beyond the free pass, in its technical meaning, and included any transportation issued for any discriminatory consideration. *Idem*.

Same. The title of a legislative Act is sufficient if it furnishes a key to the subject matter of the Act: So that the terms "free pass" and "discriminating reduced rate" are so closely related that when used in the title, either is sufficient to indicate a person who has

STATUTES Continued

TO

TAXATION

purchased transportation at a nominal, or greatly disproportionate rate, where the consideration is indefinite or evasive. *Idem.*

Constitutional law: Prohibition of free pass: Class legislation. The legislature has power under the constitution to deal with the pass evil, in the interest of the public welfare; and that power cannot be abridged by the fact that in its exercise the right of contract between an employer and employee may be incidentally interfered with: Nor will the fact that the law for that purpose exempts certain persons from its operation render it unconstitutional. *Idem.*

Same: Conflict of statutes. The Act of Congress prohibiting free transportation has relation to interstate transportation, while the state statute does not purport to apply to that subject and is therefore not void for conflict with the federal statute. *Idem.*

Same: Partial invalidity. Although the provisions of the state statute relating to testimony and the burden of proof were unconstitutional, it would not invalidate the whole Act; as the same are not essential to the integrity of the Act as a whole. *Idem.*

Anti-pass Law. The anti-pass statute when fairly construed is not an interference with congressional jurisdiction over the subject of interstate commerce, and hence is not void on that ground. *Idem.*

STATUTE OF FRAUDS. See CONVEYANCES.

STREETS. See MUNICIPAL CORPORATIONS.

TAXATION. See MUNICIPAL CORPORATIONS.

Assessment: Omitted property. A judgment of the court cancelling an assessment of property made by the assessor and board of equalization, when not appealed from, is final; and the property cannot be again assessed by the treasurer as omitted property. *Bfainard v. Harlan, Treas., 436.*

Omitted property: Settlement: Repudiation by county. Tax ferrets have authority to settle with a taxpayer for the amount he should have paid on omitted property, and in doing so could take into consideration the amount he had been regularly assessed, although not authorized to deal with taxes regularly assessed and unquestioned; and the county cannot repudiate a settlement thus made without tendering back the amount received under the settlement. *Barthell v. Hermanson, 329.*

TAXATION Continued TO TRUSTS

Treasurer's receipt: Parol evidence. A treasurer's receipt for the payment of taxes is not conclusive on the subject, but is subject to explanation by parol. *Idem.*

Previous settlement of taxes: Evidence. In this action to enjoin the sale of land for taxes of a certain year, the evidence is held to show that a settlement of taxes on omitted property included taxes previously assessed, as shown by a decree entered upon a stipulation of the parties. *Idem.*

Mutual mistake: Estoppel. Where a county retained the money paid as taxes under a settlement between tax ferrets and the taxpayers it was bound by the settlement, although the same was paid under a mutual mistake. *Idem.*

Land contract: Option. A contract respecting the sale of land which amounts simply to an option to buy is not taxable as moneys and credits. In the instant case the provisions of a lease giving the lessee a right to purchase on the payment of a stated sum at a specified time is held to be an option rather than a contract of sale, and therefore not taxable. *Bissell v. Board of Review*, 38.

TENANTS IN COMMON. See REAL PROPERTY.

TRUSTS. See FRAUD.

Construction: Beneficiaries. In this action to determine the beneficiaries under a trust deed it appeared that the donor had previously created a life estate in the property, but by the terms of the deed the trustee was directed, in case the life tenant survived her and died without issue, to convey the property to the heirs of the donor in such shares as they would have received had she died owning the property. The donor died testate and bequeathed the residue of her property to her children, including the life tenant. *Held*, that as the duties of the trustee were fixed and irrevocable by the terms of the deed itself and in no manner subject to the direction of the grantor, the identity of the beneficiaries to whom the trustee was to convey was to be determined from the deed, independently of the will. *McCash v. Derby*, 371.

Same. The provision of the trust deed that in case of the death of the life tenant without issue the trustee was to convey the property to the heirs of the donor, fixed the class who should receive the property as grantees, and amounted to a distribution of the property among living children of the donor and the representatives of those deceased. *Idem.*

TRUSTS Continued

TO

WILLS

Same: Wills: Construction. Under the provisions of the trust deed in suit, directing a conveyance of the property to the children of the life tenant upon her death, if any, but in case she left no issue then to the children of the donor, the life tenant though surviving the donor, but without issue, took no interest in the remaining estate which would pass by her will. *Idem*.

Resulting trust: Enforcement. Where a husband invested his wife's money in land, taking the legal title in his own name, no presumption of advancement arises, but rather a resulting trust in favor of the wife to the extent of her funds so invested. And where the husband did not deny the existence of the trust but impliedly admitted it, he could not rely upon the statute of limitations, laches or adverse possession to prevent its enforcement. *Johnson v. Foust*, 195.

VENDOR AND VENDEE. See REAL PROPERTY.

WARRANTIES. See SALES.

WAIVER. See REAL PROPERTY.

WILLS. See TRUSTS.

Construction: Revocation of devise. The testator by his original will gave his estate to his lawful heirs in equal shares, except one who was to receive \$400 less than the others, he having previously received that amount in land; and in a codicil he stated, "I desire to change the will in regard to J. W. Langfitt, he having received his share in land under value." *Held*, that it was the intent of testator that such heir should take no part of the estate, the amount received in land being of such value that he had already had his share; and that the form of the bequest in the codicil being expressed as a wish or desire did not defeat it. *Harrison v. Langfitt*, 479.

Probate: Effect: Action to set will aside. The admission of a will to probate without contest is a preliminary order which affects a *prima facie* establishment of the instrument, but does not cut off the right to contest its validity by an original action brought within the statutory five year period. *Kelly v. Kelly*, 56.

Contest: Mental capacity: Evidence. In this will contest on the ground of mental incapacity, the evidence is held sufficient to take the question of testator's incapacity to the jury, and to support a

WILLS Continued

finding that he was mentally incompetent when the will and codicil were executed. In re Estate of Law, 609.

Appeal: Review of verdict. Where there is substantial evidence in support of the finding that testator was mentally incompetent to make a will, the appellate court will not disturb the verdict on the ground of passion and prejudice. *Idem.*

Non-expert evidence. A non-expert witness may give his opinion of the mental condition of a testator, when based upon and limited to the facts first detailed by him, and which are sufficient to justify an inference of insanity. *Idem.*

Mental capacity: Instruction. A testator must have had sufficient strength of mind to know and comprehend the nature and extent of his property, the objects of his bounty, and the distribution he desired to make of his estate. The instruction in this case conforms to this rule. *Idem.*

Opinion evidence: Weight: Instruction. The weight to be given the evidence of expert and non-expert witnesses, as to the mental unsoundness of a testator, is a matter peculiarly within the judgment and discretion of the jury, after they have first determined whether the facts testified to by the witness are consistent with unsoundness of mind, and whether the facts recited in the hypothetical questions to the experts have been established by the evidence. The instruction on the subject as given by the court in this case was correct. *Idem.*

Requested instructions. Refusal of a requested instruction, substantially covered by that given by the court, is not ground for complaint; nor was the refusal of a correct requested instruction, to the effect that the opinions of non-experts, testifying to the unsoundness of mind of testator, need not be based on detailed facts and circumstances but only on acquaintance and opportunity for observation, reversible error; the court having admitted such evidence and thus given effect to the rule, and having directed the jury to consider all the evidence in determining the issue. *Idem.*

Mental capacity: Evidence. Evidence of the mental and physical condition and habits of the executors named in a will is admissible, as bearing on the mental condition of the testator. *Idem.*

Estate granted: Rule in Shelley's case. A will devising property to a son and to the heirs of his own body is not within the

WILLS Continued

rule in Shelley's case, but created a conditional estate in the son, which upon the birth of issue would become absolute; and upon his death without issue the estate would revert to the heirs of the testator. To bring the will within the rule in Shelley's case the limitation to heirs must be by way of remainder, it does not apply to one and his heirs, or to the heirs of his body. *Sagers v. Sagers*, 729.

Remainders. Where the testator devised his real property to his wife for life, with power to control, use the income and to convert the same into other property, with the remainder to his children in equal shares, the portion left upon the death of the wife, and that acquired by her out of the proceeds of the estate, passed to the remaindermen, the administrator as such having no interest therein. *Hatton v. Wheaton*, 460.

Descent and distribution: Heirs: Title to real estate. Under a will creating a life estate in the widow, with the remainder in testator's children, the husband of a child who predeceased the widow was not entitled to any part of the widow's estate, either as heir or otherwise, and her administrator properly refused to recognize him in the distribution of the estate; and whether he would take a third of the share devised to the deceased child was not a matter of concern to the administrator, except as it might have come into his possession; and the title to the deceased child's share in the realty was not a matter which could be litigated in the probate proceedings. *Idem*.

Distributive share: Action: Parties. Under a will devising real estate to the wife for life, with power to use and convert the profits into other property to be held on the same conditions, and devising the remainder to the testator's children, the administrator of the widow, on coming into possession of the testator's property, was accountable to the testator's executor or to the remaindermen therefor; and in an action by the husband of testator's daughter, who predeceased the widow, against the administrator of the widow to compel recognition of his interest in the share of his deceased wife, the testator's executor and the children of plaintiff's wife were necessary parties. *Idem*.

Remainder: When vested. The provision of a will that the remainder shall pass to remaindermen on the death of the life tenant, has reference to the time when the remaindermen shall come into possession of the property; and, in the absence of language requiring a different construction, will not prevent the vesting of the remainder immediately upon the death of the testator. In the

WILLS Continued

instant case the testator gave his personal estate and a life interest in all of his real estate to his wife, and provided that upon the death of the wife a certain tract of land should be divided among his three sons; *Held*, that the vesting of the remainder was not postponed until the death of the widow. *Schrader v. Schrader*, 85.

Same: Condition subsequent: Vesting of remainder. As between contingent and vested estates courts incline to the latter, whenever it can be done without violence to the language of the instrument. Thus, a devise made upon the condition that a remainderman pay a stated sum of money to another person, with no limitation over upon failure to make such payment, is a condition subsequent and not precedent to the vesting of title; and is in the nature of a legacy to the third person so designated, to be treated as a charge upon the land devised. In the instant case a clause in the will providing: "that before George Schrader shall become the sole, absolute and unqualified owner . . . he shall pay to . . . Henry Schlader the sum of \$500," in the connection used, is held to have created a condition subsequent. *Idem*.

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